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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE

WESTERN DIVISION,
APRIL TERM, 1915

EASTERN DIVISION,
SEPTEMBER TERM, 1915.

MIDDLE DIVISION,
DECEMBER TERM, 1915.

FRANK M. THOMPSON,
ATTORNEY-GENERAL AND REPORTER.

VOL. VI.

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GRAFTON GREEN.
A. S. BUCHANAN.

WESTERN DIVISION.
M. M. NEIL, CH. J.

MIDDLE DIVISION.
A. R. GHOLSON, Special Judge *

EASTERN DIVISION.
SAMUEL C. WILLIAMS.

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FRANK M. THOMPSON,
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COURT OF CIVIL APPEALS OF TENNESSEE.

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H. Y. HUGHES.

MIDDLE DIVISION.
S. F. WILSON.
JOS. C. HIGGINS.

WESTERN DIVISION.
FRANK P. HALL.
FELIX W. MOORE.

*In lieu D. L. Lansden, Regular Judge.

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CASES REPORTED.

A

Anderson et al., Elledge v.	478
Ashby et al., Gilbert v.	370
Auto Storage Co., Blackwood Tire & Vulcanizing Co. v.	515

B

Baker v. Dew et al.	126
Banking & Trust Co., O. & D. of Knoxville, Green v.	609
Banking & Trust Co., Knoxville, Knaffl v.	655
Bashor v. Bowman.	269
Battle et al. v. Claiborne et al.	286
Belt Ry. Co. et al., Shipp et ux. v.	238
Bennett et al. v. Hutchens et al.	65
Bivens v. State.	40
Blackwood Tire & Vulcanizing Co. v. Auto Storage Co.	515
Bowman, Bashor v.	269
Burnett v. Layman.	323

C

Carter et al., Richmond Type & Electrotpe Foundry v.	489
Childress v. State.	121
City of Chattanooga v. Powell.	137
City of Memphis et al. v. State ex rel. Ryals.	83
Cincinnati, N. O. & T. P. Ry. Co., Sharp v.	1
Cincinnati, N. O. & T. P. Ry. Co. v. Wright.	74
Claiborne et al., Battle et al. v.	286
Coal Creek Min. & Mfg. Co. et al., Jones et al. v.	183
Coal Creek Mining & Mfg. Co. et al., Jones v.	159
Coal Co. et al., Westborne, v. Willoughby.	257
Cohn v. Hitt et al.	466
Cohn v. Lunn.	547
Columbia, Godwin & Santa Fe Turnpike Co., The State v.	446
Copper Rubber Co. v. Johnson et al.	562
Corse, People's Nat. Bank v.	720

D

Dew et al., Baker v.	126
Dunbar, Volunteer State Life Ins. Co. v.	331

E

Edwards v. Hambly Fruit Products Co. et al.	142
Elledge v. Anderson et al.	478
Estes, State ex rel. v. Goodman et al.	375

F

Fidelity & Casualty Co. of N. Y., Stone v.....	672
Franklin County et al., Walmsley et al. v.....	579
Franklin v. The Duncan et al.	472

G

German-American Monogram Mfrs. v. Johnson.....	571
Gilbert v. Ashby et al.	370
Giles County v. Marshall County.....	414
Godwin & Santa Fe Turnpike Co., Columbia, The State v.....	446
Goodman et al., State ex rel. Estes v.....	375
Green v. O. & D. of Knoxville Banking & Trust Co.	609

H

Haire et al., Smith et al. v.....	343
Hambly Fruit Products Co. et al., Edwards v.....	142
Hickman, Standard Knitting Mills v.....	43
Hitt, Cohn et al. v.....	466
Howard v. Nashville, C. & St. L. Ry. Co.....	19
Hughes et al., McKee v.....	455
Hunt Contracting Co. et al., McDowell v.....	437
Hutchens et al., Bennett et al., v.....	65

I

Imperial Realty Co. et al., Morton v.....	681
In re Bacon.....	655
In re Forked Deer Drainage District.....	684
Insurance Co., National Life & Accident Insurance Co. v. Jordan.	495

J

Jackson et al. v. Thornton et al.....	36
Johnson City v. Tennessee Eastern Electric Co.....	632
Johnson et al., Copper Rubber Co. v.....	562
Johnson, German-American Monogram Mfrs. v.....	571
Johnson City v. Weeks et al.....	277
Jones et al. v. Coal Creek Mining & Mfg. Co. et al.....	159
Jones et al. v. Coal Creek Min. & Mfg. Co. et al.....	183
Jordan, National Life & Accident Insurance Co. v.....	495

K

Knafl v. Knoxville Banking & Trust Co.....	655
Knitting Mills, Standard v. Hickman.....	43
Knoxville Banking & Trust Co., Knafl v.....	655
Knoxville Iron Co., Spitzer v.....	217

L

Laster, McCravy v. State of Tennessee.....	358
Lay, Tennessee Power Co. v.....	511

Layman, Burnett v.....	323
Lewisburg & N. R. Co., Tillman v.....	554
Lillienkamp v. Rippetoe.....	57
Long v. Mickler.....	51
Louisville & N. R. Co. v. McKay & Morgan.....	503
Louisville & N. R. Co. et al., McKay v.....	590
Lunn, Cohn v.....	547

Mc

McCravy & Laster v. State of Tennessee.....	358
McDowell v. Hunt Contracting Co. et al.....	437
McKay v. L. & N. R. Co. et al.....	590
McKay & Morgan, Louisville & N. R. Co. v.....	503
McKee v. Hughes et al.....	455

M

Marion County et al., Raulston County et al. v.....	433
Marshall County, Giles County v.....	414
Memphis St. Ry. Co. v. Rapid Transit Co.....	99
Meek et al. v. Trotter et al.....	145
Mickler, Long v.....	51
Mining & Mfg. Co., Coal Creek, Jones, et al. v.....	159
Mining & Mfg. Co. et al., Coal Creek, Jones et al. v.....	183
Minton v. Wilkerson et al.....	484
Monogram Mfrs., German-American v. Johnson.....	571
Moore, Preston v.....	247
Morton v. Imperial Realty Co. et al.....	681

N

Nashville, C. & St. L. Ry. Co., Howard v.....	19
Nashville, C. & St. L. Ry. Co. et al., Western Union Tel. Co. v....	691
National Life & Accident Insurance Co. v. Jordan.....	495

O

Officers and Directors of Knoxville Banking & Trust Co., Green v..	609
--------------------------------------------------------------------	-----

P

Peoples' National Bank v. Corse.....	720
Perry et al. v. Young et al.....	522
Powell, City of Chattanooga v.....	137
Preston v. Moore.....	247

R

Railroad Co. et al., Nashville, C. & St. L., Western Union Tel. Co. v.	691
Railroad Co. et al., L. & N., McKay v.....	590
Railroad Co., Louisville & N. V. McKay & Morgan.....	503

Railroad Co., Lewisburg & Northern, Tillman v.	554
Railway Co., C., N. O. & T. P., Sharp v.	1
Railway Co., C., N. O. & T. P. v. Wright.	74
Railway Co. et al., Belt, Shipp, et ux. v.	238
Railway Co., N. C. & St. L., Howard v.	19
Railway Co., Southern, Salmon v.	223
Rapid Transit Co., Memphis St. Ry. Co., v.	99
Raulston et al. v. Marion County et al.	433
Richmond Type & Electrotpe Foundry v. Carter et al.	489
Rippetoe, Lillienkamp v.	57
Rylas, State ex rel., City of Memphis et al. v.	83

State

State, Bivens v.	40
State, Childress v.	121
State ex rel. Estes v. Goodman et al.	375
State ex rel. Ryals, City of Memphis et al. v.	83
State of Tennessee, McCravy & Laster v.	358
State, Sams v.	188
State, Watson v.	198

S

Salmon v. Southern Ry. Co.	223
Sams v. State.	188
Sharp v. C. N. O. & T. P. Ry. Co.	1
Shipp et ux. v. Belt Ry. Co. et al.	238
Smith et al. v. Haire et al.	343
Southern Ry. Co., Salmon v.	223
Spitzer, v. Knoxville Iron Co.	217
Standard Knitting Mills v. Hickman.	43
Stone v. Fidelity & Casualty Co. of N. Y.	672
Street Ry. Co., Memphis, v. Rapid Transit Co.	99

T

Telegraph Co., Western Union v. Nashville, C. & St. L. Ry. Co. et al.	691
Tennessee Eastern Elec. Co., Johnson City v.	632
Tennessee Power Co. v. Lay.	511
Tillman v. Lewisburg & N. R. Co.	554
Tire & Vulcanizing Co., Blackwood v. Auto Storage Co.	515
The Duncan et al., Franklin v.	472
The State v. Columbia, Godwin & Santa Fe Turnpike Co.	446
Thornton et al., Jackson et al. v.	36
Trotter et al., Meek et al. v.	145
Type & Electrotpe Foundry v. Carter et al.	489

V

Vandiver, Walker v.	423
Volunteer State Life Ins. Co. v. Dunbar.	331

W

Walker v. Vandiver.....	423
Walmsley et al. v. Franklin County et al.....	579
Watson v. State.....	198
Weeks et al., Johnson City v.....	277
Westborne Coal Co. et al. v. Willoughby.....	257
Western Union Tel. Co. v. Nashville C. & St. L. Ry. Co. et al.....	691
Wilkerson et al., Minton v.....	484
Willoughby, Westborne Coal Co. et al v.....	257
Winslow v. Winslow.....	663
Wright, C., N. O. & T. P. Ry. Co., v.....	74

Y

Young et al., Perry et al. v.....	522
-----------------------------------	-----

TENNESSEE CASES CITED.

A

Adams v. Insurance Co., 117 Tenn., 470.....	62
Agee v. Saunders, 127 Tenn., 680.....	7
Albitztigui v. Guadalupe, etc., Mining Co., 92 Tenn., 600.....	615
Alder, Admr. v. Buckley, 31 Tenn., 69.....	328
Allen v. Walt, 56 Tenn., 242.....	130
Alley v. Connell, 40 Tenn., 578.....	482
Allison v. Coal Co., 87 Tenn., 63.....	615
Alvis v. Oglesby, 87 Tenn., 182.....	169
Ames v. Norman, 36 Tenn., 683.....	70
Anderson v. Louisville & N. R. Co., 128 Tenn., 244.....	14
Anthony v. Smith, 28 Tenn., 511.....	491
Apperson v. Pattison, 79 Tenn., 484.....	169
Arbuckle v. Kirkpatrick, 98 Tenn., 221.....	595
Armstrong v. Park's Devises, 28 Tenn., 195.....	153
Arnold v. Knoxville, 115 Tenn., 195.....	687
Ashby v. State, 124 Tenn., 684-723.....	201
Automobile Co. v. Bicknell, 129 Tenn., 493.....	521

B

Bank v. Chapman, 122 Tenn., 415.....	550
Bankhead v. Alloway, 46 Tenn., 56.....	508
Bank v. Railroad, 128 Tenn., 530.....	507
Bank v. Railroad, 128 Tenn., 530.....	508
Bank v. Woods, 125 Tenn., 6.....	477
Barnum v. Le Master, 110 Tenn., 640.....	309, 321
Barrow v. Nashville, etc., Turnpike Co., 28 Tenn., 304.....	341
Beddingfield v. Estill & Newman, 118 Tenn., 39.....	71
Bennett et al. v. Hutchens et al., 133 Tenn., 65.....	130
Berrigan v. Fleming, 70 Tenn., 271.....	70
Berry v. Walden, 5 Tenn., 174-177.....	186
Berry v. Wallen, 1 Tenn., 186.....	487
Bible v. Marshall, 103 Tenn., 324.....	320
Bigham v. Madison, 103 Tenn., 358.....	507
Bird v. State, 131 Tenn., 518.....	349
Bleadles v. Alexander, 68 Tenn., 644.....	404
Bledsoe v. Stokes, 60 Tenn., 312.....	13
Brewer v. Tennessee Coal, etc., Co., 97 Tenn., 615.....	47
Bridgenor v. Rodgers, 41 Tenn., 260.....	419
Brien v. Robinson, 102 Tenn., 157.....	17
Bowden v. Higgs, 77 Tenn., 346.....	346
Brown v. Electric Co., 101 Tenn., 252.....	141
Buck Stove Co. v. Johnson, 75 Tenn., 282.....	372

C

Callis v. Cogbill, 77 Tenn., 138.....	507
Campbell Co. v. Wright, 127 Tenn., 1.....	105
Cannon v. Cannon, 26 Tenn., 410.....	38
Cannon v. Mathes, 55 Tenn., 504.....	583, 585
Carpenter v. Franklin, 89 Tenn., 142.....	373
Carver Gin & Machine Co. v. Bannon & Co., 85 Tenn., 712....	372
Cary-Lombard Lumber Co. v. Thomas, 92 Tenn., 593.....	682
Chambers v. Chambers, 92 Tenn., 707.....	71
Chapman v. State, 39 Tenn., 36.....	17
Cincinnati, etc., Co. v. Brock, 132 Tenn., 477.....	80
City of Memphis et al. v. State ex rel. Ryals, 133 Tenn., 83.....	107
Clark v. Jones, 93 Tenn., 641.....	491
Cleveland v. Martin, 39 Tenn., 128.....	491
Cocke v. Gooch, 52 Tenn., 294.....	417
Cole Mfg. Co. v. Falls, 90 Tenn., 469.....	585
Condon v. Maloney, 108 Tenn., 99.....	585
C., N. O. & T. P. R. R. Co. v. Brock, 132 Tenn., 477.....	595
Cooper v. Maddox, 34 Tenn., 135.....	486
C., O. & S. W. R. R. Co. v. Higgins, 85 Tenn., 620.....	13
Cormick v. Richards, 71 Tenn., 1.....	494
Cornwell v. Cornwell, 30 Tenn., 487.....	346
Cox v. Scott, 68 Tenn., 305.....	130, 353
Creech v. Jones, 37 Tenn., 631.....	186

D

Daly v. Drug Co., 127 Tenn., 412.....	371, 479, 481
D'Arcy v. Mutual Life Ins Co., 108 Tenn., 567.....	131
Darden v. Hatcher, 41 Tenn., 513.....	154
Davidson Benedict Co. v. Severson, 109 Tenn., 572.....	9
Davis' Adm'r v. Garrett, 91 Tenn., 148.....	307
Davis v. Baugh, 33 Tenn., 478.....	403
Davis v. Cross, 82 Tenn., 641.....	307
De Liquero & Crozier v. Munson, 58 Tenn., 18.....	494
Demoss v. Demoss, 47 Tenn., 256.....	314
Den v. Deaderick, 9 Tenn., 125.....	725
De Tavernier v. Squire Hunt, 53 Tenn., 600.....	436
Douglass v. Baber, 83 Tenn., 346.....	346

E

East Tennessee, etc., R. Co. v. St. John, 37 Tenn., 525.....	79
--------------------------------------------------------------	----

F

Fargason v. Ball, 128 Tenn., 137.....	508
Fecheimer-Keifer Co. v. Burton, 128 Tenn., 682.....	371

Ferguson v. Booth, 128 Tenn., 259.....	309, 321
Flatley v. M. & C. R. R. Co., 56 Tenn., 230.....	13
Fleming v. Railroad, 106 Tenn., 374.....	264
Fourth Nat'l Bank v. Stahlman, 132 Tenn., 367.....	337
Fowlkes v. Heirs & Creditors of Bowers, 79 Tenn., 144.....	373
Frank v. Frank, 120 Tenn., 569.....	151
Franklin v. Franklin, 90 Tenn., 44.....	403, 404
Frazier v. Railroad Co., 88 Tenn., 157.....	583
Frazier v. Railroad, 88 Tenn., 156.....	585
Furnace Co. v. Railroad Co., 113 Tenn., 697.....	585

G

Gilliam v. Esselman, 37 Tenn., 86.....	658
Gordon v. English, 71 Tenn., 634.....	225
Gotcher v. Burrows, 28 Tenn., 585.....	418
Graham v. McCampbell, 19 Tenn., 52.....	491
Greenlee v. Railroad Co., 73 Tenn., 418.....	20
Guion v. Anderson, 27 Tenn., 298.....	167

H

Hall v. Fowlkes, 56 Tenn., 754.....	445
Hamrico v. Laird, 18 Tenn., 222.....	131
Handwerker v. Diermeyer, 96 Tenn., 619.....	130
Harlan v. Sweeny, 69 Tenn., 686.....	658
Haworth v. Montgomery, 91 Tenn., 16.....	682
Hermitage National Bank v. Carpenter, 131 Tenn., 136.....	469
Hickerson v. Raiguel, 49 Tenn., 329.....	469
Hobbs v. Memphis & Charleston R. R. Co., 56 Tenn., 873.....	10
Holder v. Railroad Co., 92 Tenn., 142.....	220
Hollingsworth v. Mith (Miller), 37 Tenn., 472.....	130
Holston v. Coal & Iron Co., 95 Tenn., 521.....	14
Hopson v. Fowlkes, 92 Tenn., 697.....	71

I

Ice & Coal Co. v. Alley, 127 Tenn., 173.....	521
Insurance Co's. v. Confectionery Co., 124 Tenn., 247.....	625
Insurance Co. v. Craig, 106 Tenn., 624.....	342
Iron Co. v. Railroad, 131 Tenn., 236.....	187

J

Jackson Insurance Co. v. Partee, 56 Tenn., 296.....	372
Jackson v. Meek, 87 Tenn., 69.....	615
Jackson, Orr & Co. v. Shelton, 89 Tenn., 82.....	70
Jobe v. Dillard, 104 Tenn., 658.....	412
Joiner v. Franklin, 80 Tenn., 422.....	130
Johnson v. Churchwell, 38 Tenn., 146.....	615
Johnson et al. v. Lusk. Exr., et al., 46 Tenn., 113.....	352

Johnson v. Fry, 41 Tenn., 101.....	403
Johnson v. Johnson, 103 Tenn., 32.....	354
Johnson v. Johnson, 67 Tenn., 261.....	301
Johnson v. Lusk, 46 Tenn., 114.....	70
Johnson v. State, 100 Tenn., 252-259.....	211
Jones v. Arterburn, 30 Tenn., 97.....	403
Jones v. Ward, 18 Tenn., 168.....	130

K

Katzenberger v. Weaver, 110 Tenn., 620.....	151
King v. Sullivan County, 128 Tenn., 393.....	436
Knight v. Cooley, 131 Tenn., 21.....	595
Knoxville v. Park City, 130 Tenn., 626.....	281

L

Land Co. v. Hilton, 121 Tenn., 308.....	307
Landreth v. Schevenel, 102 Tenn., 486.....	573
Lane v. Farmer, 79 Tenn., 568.....	130
Lassiter v. Travis, 98 Tenn., 330.....	346
Latta v. Brown, 96 Tenn., 343.....	153
Levisay v. Delp, 68 Tenn., 415.....	115
Lewis v. McLemore, 18 Tenn., 206.....	508
Lillienkamp v. Rippetoe, 133 Tenn., 57.....	72, 129
Link v. State, 50 Tenn., 252.....	192
Loague v. Railroad, 91 Tenn., 458-460.....	14
Loftus v. Penn., 31 Tenn., 445.....	135
Luehrman v. Taxing District, 70 Tenn., 156.....	585
Lynch v. Burts, 48 Tenn., 600.....	412
Lynch v. State, 99 Tenn., 124.....	192

Mc

McClung v. Sneed, 40 Tenn., 218.....	313
McDaniel v. Douglas, 25 Tenn., 221.....	313
McDonald v. Railroad, 93 Tenn., 281.....	723
McElhatton v. Howell, 5 Tenn., 19.....	353
McEwen v. Bamberger, 71 Tenn., 576.....	308
McEwen v. Troost, 33 Tenn., 186.....	307
McKelvey v. McKelvey, 111 Tenn., 388.....	59
McMillan v. Hannah, 106 Tenn., 689.....	419
McMillan v. Mason & Sherrill, 45 Tenn., 263.....	352
McRoberts v. Copeland, 85 Tenn., 211.....	70
McWhirter v. Cockrell, 39 Tenn., 9.....	275

M

Mahoney-Jones Co. v. Sams Bros., 128 Tenn., 207.....	371, 372
Manufacturing Co. v. Buchanan, 118 Tenn., 238.....	521
Massie v. Jordan, 69 Tenn., 646.....	412
Mason & Holman v. Holman, 78 Tenn., 315.....	307

xviii **TENNESSEE CASES CITED. [133 Tenn.**

Maury County v. Lewis County, 31 Tenn., 236.....	419, 420
Meacham v. Graham, 98 Tenn., 190.....	151
Mitchell v. Bank, 126 Tenn., 669.....	133
Moore v. Steele, 29 Tenn., 563.....	403, 404
Morrell v. Fickle, 71 Tenn., 79.....	583, 585
Morris et al. v. Swaney et al., 54 Tenn., 591.....	403
Murrell v. Rich, 131 Tenn., 378.....	595
Muse v. State, 106 Tenn., 181.....	192

N

Nailer v. Young, 75 Tenn., 735.....	307
Nashville & Chattanooga R. R. Co. v. Eakin, 46 Tenn., 582.....	10
Nashville & Chattanooga R. R. Co. v. Sprayberry, 56 Tenn., 852..	10
Nashville & Chattanooga R. R. Co. v. Sprayberry, 67 Tenn., 341..	10
Nichol v. Davidson County, 3 Tenn. Ch., 547.....	307
Norvell v. Gray, 31 Tenn., 96, 107.....	187

O

Orgain v. Irvine, 100 Tenn., 194.....	404
----------------------------------------------	------------

P

Padgett v. Ducktown, etc., Iron Co., 97 Tenn., 690.....	18
Parkey v. Ramsey, 111 Tenn., 302.....	312, 315, 320
Parlow v. Turner, 132 Tenn., 339.....	129
Partee v. Goldberg, 101 Tenn., 664.....	441
Patton v. Dixon, 105 Tenn., 97.....	167
Patton v. Railway, 89 Tenn., 370.....	80
Perkins v. Ament, 39 Tenn., 116.....	469
Peterson v. State, 104 Tenn., 131.....	585
Pile v. Pile, 74 Tenn., 508.....	352, 353
Phillips v. Hollister, 42 Tenn., 269.....	508
Planters' Bank v. Vandyck, 51 Tenn., 617.....	521
Prater v. Marble Co., 105 Tenn., 496.....	220
Prewitt v. Bunch, 101 Tenn., 723.....	353

Q

Queen v. Dayton Coal & Iron Co., 95 Tenn., 458.....	62
Quinby v. Merritt, 30 Tenn., 439.....	349

R

Railroad v. Acuff, 92 Tenn., 348.....	220
Railroad v. Byrne, 119 Tenn., 299.....	583
Railroad Co. v. Smith, 123 Tenn., 678.....	597
Railroad Co. v. Stone & Haslett, 112 Tenn., 348.....	597
Railroad Co., v. Telegraph Co., 101 Tenn., 62.....	707
Railroad v. Fain, 808 Tenn., 35.....	264
Railroad v. Fidelity & Guaranty Co., 125 Tenn., 674.....	507
Railroad v. Foster, 78 Tenn., 351.....	10

133 Tenn.] TENNESSEE CASES CITED. xix

Railway v. Haynes, 112 Tenn., 712.....	63
Railroad v. Herb, 125 Tenn., 408.....	15
Railroad v. Martin, 85 Tenn., 134.....	498, 502
Railroad v. Meacham, 91 Tenn., 428.....	263
Railroad v. Railroad, 116 Tenn., 500.....	711
Railroad v. S. W. Tel. Co., 121 Fed., 276.....	708
Railroad v. Tel. Co., 101 Tenn., 62.....	716
Railroad v. Timmons, 116 Tenn., 29.....	501
Railroad v. Transportation Co., 128 Tenn., 277.....	274
Ransom v. Rutherford County, 123 Tenn., 1.....	349
Reagan v. Stanley, 79 Tenn., 316-325.....	404
Redistricting Cases, 111 Tenn., 234.....	450
Reid v. Campbell, 19 Tenn., 378.....	313
Reynolds v. Equitable Acc. Ass'n, 59 Hun., 13.....	677
Rice v. Alley, 33 Tenn., 51.....	272
Rice v. Crow, 53 Tenn., 28.....	493
Rice v. McReynolds, 76 Tenn., 36.....	130
Rice v. Mc Reynolds, 76 Tenn., 37.....	353
Richi v. Chattanooga Brewing Co., 105 Tenn., 651.....	117
Roach v. Turk, 56 Tenn., 708.....	508
Roberts v. Francis, 49 Tenn., 127.....	491
Rowlett v. Rowlett, 116 Tenn., 458.....	315, 321

State

State v. Brown, 103 Tenn., 449.....	583
State v. Cooper, 120 Tenn., 549.....	136
State ex rel. v. Cummings, 130 Tenn., 566.....	689
State ex rel. v. Powers, 124 Tenn., 553.....	687
State ex rel. v. Schlitz Brewing Co., 104 Tenn., 730.....	88
State ex rel. v. Turnpike Co., 112 Tenn., 617.....	342
State ex rel. v. Turnpike Co., 3 Tenn., Ch., 163.....	342
State v. Hamby, 114 Tenn., 364.....	583
State v. Mayor, etc., of London, 40 Tenn., 263.....	436
State v. Standard Oil Co., 120 Tenn., 86.....	621
State v. Yardley, 95 Tenn., 554.....	585
State v. Railway, 124 Tenn., 1.....	451
State v. Runnels, 92 Tenn., 320.....	17

S

Sanders v. Forgasson, 62 Tenn., 249.....	130
Scott v. Bank, 123 Tenn., 275.....	307
Scott v. Marley, 124 Tenn., 398.....	583, 585
Scruggs v. Heiskell, 95 Tenn., 455.....	488
Searight v. Payne, 1 Tenn. Ch., 186.....	341
Seay v. Young, 39 Tenn., 418.....	412
Sharp, Admr., v. C. N. O. & T. P. Ry. Co., 133 Tenn., 1.....	23
Sherman v. State, 125 Tenn. 19.....	493

Shields v. Netherland, 73 Tenn., 193.....	70
Shropshire v. Shropshire, 15 Tenn., 167.....	169
Shugart v. Shugart, 111 Tenn., 179.....	131
Siler v. Perkins, 126 Tenn., 380.....	508
Smart & Wife v. Waterhouse, et al., 18 Tenn., 95.....	319
Smith v. Carter, 131 Tenn., 1.....	688
Smith v. Harrison, 49 Tenn., 230.....	346
Smith v. Nashville, 88 Tenn., 464.....	282
Smith v. Neilson, 81 Tenn., 461.....	723
Smith's Ex'rs v. Mabry, 17 Tenn., 313.....	493
Smith v. Smith, 98 Tenn., 102.....	353
Snoddy v. Bank, 88 Tenn., 573.....	550
Sou. Coal & Iron Co. v. Schwoon, 124 Tenn., 176.....	169
Southern R. Co. v. Jennings, 130 Tenn., 450.....	560
Stephens v. Railway, 78 Tenn., 448.....	220
Stuber v. Railroad, 113 Tenn., 305.....	10
Stevenson v. Ewing, 87 Tenn., 46.....	682
Suggett v. Kitchell, 14 Tenn., 425.....	403
Swails v. Bushart, 39 Tenn., 561.....	354
Swift & Co. v. Warehouse Co., 128 Tenn., 82, 100.....	543
Swiney v. Swiney, 82 Tenn., 316.....	307, 354
Sword v. Young, 89 Tenn., 128.....	510

T

Taul v. Campbell, 15 Tenn., 319.....	70
Telephone & Telegraph Co. v. Mill Co., 129 Tenn., 374.....	369
Thompson v. McKisick, 22 Tenn., 631.....	412
Thompson v. Pyland, 40 Tenn., 537.....	492
Todtenhausen v. Knox County, 132 Tenn., 169.....	436, 583
Trafford v. Adams Express Co., 76 Tenn., 96.....	14
Trust Co. v. Weaver, 102 Tenn., 66.....	17
Tune v. Cooper, 36 Tenn., 296.....	131
Turner v. Lumbrick, 19 Tenn., 713.....	430

U

Union Bank v. Baker, 27 Tenn., 447.....	249
Union County v. Knox County, 90 Tenn., 541.....	419

V

Vaughan v. Cator, 85 Tenn., 302.....	151
--------------------------------------	-----

W

Wade v. Cantrell, 38 Tenn., 346.....	130
Waddle, Admir. v. Terry, 44 Tenn., 51.....	313
Waddle v. Stuart, 36 Tenn., 535.....	187
Wallace v. Lincoln Savings Bank, 89 Tenn., 630.....	617, 621, 626
Wallace v. State, 72 Tenn., 309.....	192
Walker v. Bobbitt, 114 Tenn., 700.....	71, 320

Walker v. Fox, 85 Tenn., 154.....	187
Waterbury v. Netherland, 52 Tenn., 512.....	313
Weakley v. Page, 102 Tenn., 179.....	117
Webb v. Railway Co., 88 Tenn., 119.....	220
Webb v. Tarver & Wife, 2 Tenn., Chan App., 366.....	549
Weidner v. Friedman, 126 Tenn., 677.....	117
Weeks v. McNulty, 101 Tenn., 495.....	63
Weisinger v. Murphy, 39 Tenn., 675.....	167
White v. Bates, 89 Tenn., 570.....	668
White v. Lavender, 37 Tenn., 648.....	186
White v. Railroad, 108 Tenn., 739.....	263
Whitlow v. N. C. & St. L. Ry. Co., 114 Tenn., 344.....	10
Williams v. Gray, 41 Tenn., 105.....	313, 320
Wilcox v. Morrison, 77 Tenn., 700.....	527, 539
Williams v. Nashville, 106 Tenn., 533.....	266
Williams v. Williams, 18 Tenn., 20.....	412
Williford v. Phelan, 120 Tenn., 589.....	131
Wood v. Clapp, 36 Tenn., 65.....	328
Woods v. Bonner, 89 Tenn., 411.....	304
Wolcott v. Whitcomb, 40 Vt., 40.....	275
Wright v. Keifer, 131 Ill. App., 298.....	427

OTHER CASES CITED.

A

Ables v. Planter's etc., Ins. Co., 92 Ala., 383.....	443
Abbott v. Abbott, 67 Me., 304.....	59
Adams v. Young, 200 Mass., 588.....	482
Allen v. Gilman (C. C.), 127 Fed., 609.....	140
Allen v. Riley, 203 U. S., 347.....	553
Allen v. Stevens, 29 N. J. Law, 509.....	275
Alexander v. Elizabeth, 56 N. J. Law, 71.....	451
Ambrosius v. O'Farrell, 119 Ill. App., 265.....	463
American Telephone Co. v. St. Louis, etc., R. Co., 202 Mo., 656....	708
Anderson v. R. Co., 210 Fed., 689.....	28
Appeal of Jenkins, 25 Ind. App., 532.....	27
Applegate v. Taylor, 224 Mo. 393.....	450
Arndt v. Griggs, 134 U. S., 316.....	532
Atlanata Acc. Ass'n v. Alexander, 104 Ga., 709.....	677
Atlantic, etc., R. Co. v. Postal Tel. Co., 120 Ga., 268.....	718
Auncelme v. Auncelme, Cro. Jac., 31.....	487
Averill v. Patterson, 10 N. Y., 500.....	428

B

Baccelli v. New England Brick Co., 138 App. Div. 656.....	146
Bailey v. Interstate Casualty Co., 8 App. Div., 127.....	678
Baker v. Seavey, 163 Mass., 522.....	492
Ballou v. Prescott, 64 Me., 305.....	330
Bandfield v. Bandfield, 117 Mich., 80.....	60
Banigan v. Woonsocket Rubber Co., 22 R. I., 93.....	429
Bank of America v. Pollock, 4 Edw. Ch., 215.....	251
Barbour v. Martin, 62 Me., 536.....	330
Bartlesville Elec. L. & Power Co. v. Bartlesville I. R. Co., 29 L. R. A. (N.S.), 77.....	111, 114
Batchelor v. Fortescue, L. R. 11 Q. B. Div., 474.....	268
Batione's Estate, 136 Pa., 317.....	156
Beals v. Cameron, 3 How. Prac., 414.....	429
Becker v. Janinski, 15 N. Y. Supp., 675.....	330
Beaston v. Farmers' Bank, 12 Pet. (37 U. S.), 102.....	725
Bethany Hospital Co. v. Hale, 64 Kan., 367.....	39
Blanchenhogan v. Blundell, 2 B. & Ald., 417.....	349
Blount v. Bestland, 5 Ves., 515.....	355
Bond v. Jay, 7 Cranch., 350.....	168
Boston, etc., R. Co. v. Hurd, 108 Fed., 116.....	27
Brewer v. Bowman, 9 Ga., 37.....	273
Bridgewater v. Bolton, 6 Mod., 106.....	8

Briggs v. Spaulding, 141 U. S., 132.....	626
Brown v. Milwaukee, etc., Co., 148 Wis., 98	487
Brown v. Railroad Co., 97 Ky., 228.....	27
Brown v. Schlier, 118 Fed., 981.....	337
Bryan v. Kennett, 113 U. S., 179.....	534
Bryant v. Robbins, 70 Wis., 258.....	689
Brucé v. Cincinnati R. Co., 83 Ky., 174.....	28
Burkard v. A. Leschen & Sons Rope Co., 217 Mo., 466.....	140

C

C. & A. R. R. Co. v. Joliet, Lockport & Aurora Railway Co., 105 Ill., 388.....	707
Camman v. Bridgewater, etc., Co., 12 N. J. Law, 84.....	725
Carpenter v. Farsworth, 106 Mass., 561.....	349
Carson-Rand Co. v. Stern, 129 Mo., 381.....	428
Central Coal & Iron Co. v. Thompson, 31 Ky. Law Rep., 276.....	140
Central, etc., Co. v. Vaughan, 93 Ala., 209.....	80
Central Lumber Co. v. South Dakota, 226 U. S., 157.....	96
Chamberlain v. Eckert, Fed. Cas., No. 2576.....	428
Cheatham County v. Dickson County, 39 S. W. 734.....	418
Citizens' Nat. Bank v. Froman, 111 Ky., 206.....	428
Citizens' Savings & Trust Co. v. Ill. Central R. R. Co., 205 U. S., 46.....	532
Clark v. Jones, 93 Tenn., 639.....	476
Clark v. Wells, 45 Vt., 4.....	519
Cledera v. Scottish Accident Ins. Co., 19 R., 355.....	676
Cleveland, etc., R. Co. v. Ohio Postal Tel. Co., 68 Ohio St., 306.....	717
Cobb v. Preferred Mut. Acc. Ass'n, 96 Ga., 818.....	676
Coffeyville Min. & Gas Co. v. Citizens' Natural Gas & Min. Co., 55 Kan., 173.....	114
Cohn v. Spitzer, 145 App. Div., 104.....	570
Cook v. Collier (Ch. App.), 62 S. W., 658.....	152
Coleman v. Penn. R. Co., 50 L. R. A., 432.....	601
Columbus Power Co. v. City Mills Co., 114 Ga., 588.....	487
Com. v. Churchill, 5 Mass., 174.....	427
Comins v. Newton, 92 Mass., 518.....	519
Commonwealth v. Rogers, 48 Mass., 500.....	211
Conness v. Indiana, etc., R. Co., 193 Ill., 464.....	557
Consolidated Coal Co. v. Shepherd, 220 Ill., 123.....	140
Coons v. Lain (Tex. Civ. App.), 168 S. W., 981.....	487
Cooper v. Reynolds, 10 Wall., 308.....	536
Corwin v. Comptroller, 6 S. C. 390.....	648
Cowen v. Ray, 108 Fed., 320.....	10
Crain v. Paine, 4 Cush. (Mass.), 483.....	492
Crist v. State ex rel. Whitmore, 97 Ind., 389.....	690
Cudahy Packing Co. v. Marcan, 106 Fed., 645.....	47
Curtis v. Piedmont Lumber, etc., Co., 109 N. C., 401.....	427

D

Dale v. Donaldson L. Co., 48 Ark., 188.....	330
Dashiell v. Griffith, 84 Md., 363.....	330
Davidon v. Pa. R. R. Co. (C. C.), 85 Fed., 943.....	10
Delegise v. Morrissey, 142 Wis., 234.....	347
Demond v. Crary (C. C.), 1 Fed. 480.....	428
Dennehy v. O'Connell, 66 Conn., 175.....	463
Denham v. Bristol County, 108 Mass., 202.....	275
Dennick v. Railroad Co., 103 U. S., 11.....	28
Dennison v. Page, 29 Pa., 42.....	38
Denver & R. G. R. Co. v. Whan, 11 L. R. A., 432.....	601
Dougherty v. American McKenna Process Co., Ann. Cas., 1913D.	28
Draughn v. Wolf, 11 Ky., Law Rep., 366.....	428
Dyer v. Scalmanani, 69 Cal., 637.....	428

E

Eastern Ry. Co. of New Mexico v. Ellis (Tex. Civ. App.), 153 S.	
W., 701.....	28
Edwards v. Culberson, 111 N. C., 342.....	250
Elderkin v. Fitch, 2 Ind., 90.....	443
Eldert v. Long Island Elec. R. Co., 28 App. Div., 451.....	118
Ellis v. Smith, 1 Ves. Jr., 11.....	54
Elizabethtown Cas. Co. v. Green, 46 N. J. Eq., 118.....	112
Ellsworth v. Metheney, 104 Fed., 119.....	263
Emerson v. Gaither, 103 Md., 564.....	626
Erickson v. Pacific Coast S. S. Co. (C. C.), 96 Fed., 80.....	10
Estate of Vance, 141 Pa., 201.....	157
Estate of William Parry, 188 Pa., 33.....	350
Ex Parte Ames, Fed. Cas. No. 323.....	518
Ex Parte Dickey (W. Va.), 85 S. E., 781.....	97
Ex Parte Januszewski (C. C.), 196 Fed., 123.....	123

F

Fann v. N. C. R. Co., 155 N. C., 136.....	28
Farrelly v. Emigrant Savings Bank, 92 App. Div., 529.....	350
Farris v. Hayes, 9 Or., 81.....	429
Farmers', etc., Bank v. Western, etc., Co., 215 Pa., 115.....	341
Feder v. Iowa St. Traveling Men's Ass'n., 107 Iowa, 538.....	676
Felton v. Aubrey, 20 C. C. A., 436.....	263
Ferris v. Bramble, 5 Ohio St., 109.....	275
Fickeisen v. Wheeling Electrical Co., 67 W. Va., 335.....	28
Findlay v. Keim, 62 Pa., 112.....	429
Findlay v. Railroad Co., 106 Mich., 700.....	27
Fifth Ave. Coach Co. v. New York, 221 U. S., 467.....	93
Fifth Ave. Coach Co. v. New York, 194 N. Y., 19.....	97
First Nat. Bank of Massillon v. Coughron (Ch. App.), 52 S. W.	
112.....	143

Firth v. Denny, 2 Allen (Mass.), 468	156
Fowler v. Byrd, Fed. Cas., No. 4999a	428
Freeman v. Alderson, 119 U. S., 185	536
Freethy v. Freethy, 42 Barb. (N. Y.), 641	60
Frogg v. Long, 3 Dana (Ky.), 157	427

G

Gage v. Chicago, 216 Ill., 107	428
Gardner v. Kiehl, 182 Pa., 194	429
Geneva-Seneca Electric Co. v. Economic Power & Const. Co., 136 App. Div., 219	114
George Bohon Co. v. Moren, 151 Ky., 811	428
Gibbs v. Tally, 133 Cal., 373	96
Gillette v. Tucker, 67 Ohio St., 106	328
Gist v. Shean, 8 Ky., Law Rep., 509	428
Grand Trunk R. Co. v. Stevens, 95 U. S., 655	599
Greene v. City of San Antonio (Tex. Civ. App.), 178 S. W., 9	97
Green v. Ivey, 45 Fla., 338	113
Greider v. Apperson 32 Ark., 332	428
Goldman v. Goldberger, 208 Fed. 877	471
Guiteau's Case, 10 Fed., 161	212
Gulf, C. & S. F. R. Co. v. Beezley (Tex. Civ. App.), 153 S. W., 651	28
Gunn v. White Sewing Machine Co., 57 Ark., 24	566

H

Hall v. Pratt, 103 Ga., 255	475
Halsey v. Henry Jewett Co., 190 N. Y., 231	143
Hamilton County Com'rs v. Rosche, 50 Ohio St., 103	453
Hardaway v. National Surety Co., 211 U. S., 552	723
Harding v. Coburn, 53 Mass., 333	518
Harris v. Jones, 23 N. D., 488	471
Harrison v. Lamar, 33 Ark., 824	8
Harpending v. Haight, 39 Cal., 189	648
Hartford & N. H. R. Co., v. Andrews, 36 Conn., 214	28
Haskell, etc., Co. v. Przewdziankowski, 170 Ind., 1	50
Hastings v. Travelers' Ins. Co. (C. C.), 190 Fed., 258	676
Henderson v. Lexington, 22 L. R. A. (N. S.), 104	273
Henderson v. Young, 119 Ky., 224	283
Henningsen v. U. S. Fidelity, etc., Co., 208 U. S., 404	724
Hequembourg v. City of Dundirk, 49 Hun., 550	648
Herman v. Port Blakely Mill Co., (D. C.), 71 Fed., 853	50
Hiles v. Fisher, 144 N. Y., 306	71
Hinkley v. House of Refuge, 40 Md., 461	156
Horsefall v. Pacific Mutual L. Ins. Co., 32 Wash., 132	678
Hudson v. Bunch, 116 Ind., 63	690
Huling v. Kaw Valley R. & Improvement Co., 130 U. S., 559	534

Hunnicutt v. Peyton, 102 U. S., 333.....	186
Hutchins v. Railroad Co., 44 Minn., 5.....	27

I

Illinois Surety Co. v. City of Galion (D. C.), 211 Fed., 161.....	723
Indiana, etc., R. Co. v. Conness, 184 Ill., 178.....	557
Indian Refining Co. v. Mobley, 134 Ky., 822.....	267
In re Claflin's Will, 75 Vt., 19.....	55
In re Coe's Estate, 130 Iowa, 307.....	10
In re Hickman, 4 Har. (Del.), 580.....	275
In re Jones, 166 Cal. 147.....	347
In re McCord (D. C.), 174 Fed., 72.....	471
In re Meyer, 232 Pa., 89.....	71
In re Orillia, 7 Ontario L. R., 389.....	283
In re Scarr, 1 K. B., 367.....	676
Insurance Co., v. Bennett, 90 Tenn., 256.....	679
International, etc., R. Co. v. Barton, 24 Tex. Civ. App., 122.....	429

J

Jellenik v. Huron Copper Mining Co., 177 U. S. 1.....	532
Jersey City Gas Co. v. Dwight, 29 N. J. Eq., 242.....	112
Jerseyville Shoe Mfg. Co. v. Bell, 125 Ill. App., 496.....	428
Jordan v. Chicago, etc., R. Co., 125 Wis., 581.....	27
Jordan v. Reynolds, 105 Md., 288.....	71

K

Kaukauna Water Power Co. v. Green Bay, etc., Co., 142 U. S., 254, 283	
Kent v. Bongartz, 15 R. I., 72.....	463
Keystone Bridge Co. v. Summers, 13 W. Va., 476.....	119
Kline v. Abraham, 178 N. Y., 377.....	47
Kleinst v. Kunhardt, 160 Mass., 230.....	48
Klein v. Long, 27 App. Div., 158.....	570
Knight's Case, 2 Ld. Raym, 1014.....	427
Koerner v. Henn., 8 App. Div., 602.....	576

L

Lamphere v. Oregon R. & Nav. Co., 47 L. R. A. (N. S.), 48-84....	35
Langham v. Thompson, 5 Tex., 127.....	429
Larmore v. Crown Point Iron Co., 101 N. Y., 391.....	268
Latch County v. Peterson, 3 Idaho, 398.....	275
Lathrope v. Flood (Cal.), 63 Pac., 1007.....	330
Leavenworth, etc., R. Co. v. Wilkins, 45 Kan., 674.....	559
Le Clerc v. Wood, 2 Pin. (Wis.), 37.....	427
Lehman v. Great West. Acc. Ass'n., 155 Iowa, 737.....	676
Leman v. Baltimore & O. R. R. Co. (C. C.), 128 Fed., 191.....	10
Lewis v. Lewis, 7 How. (U. S.), 776.....	173
Libby v. Berry, 74 Me., 286.....	60

Lindsay v. Lindsay, 257 Ill., 328.....	124
Liverpool & G. W. Steam Co. v. Phoenix Ins. Co., 129 U. S., 397...	599
Lord v. Ostrander, 43 Bart., 337.....	428
Loos v. Wilkinson, 113 N. Y., 485.....	482
Louisiana Citizens' Bank v. Orleans Parish Board (C. C.), 54 Fed. 73.....	459
Louisville, etc., R. R. Co. v. Bryan, 107 Ind., 51.....	266
Louisville & Nashville R. R. Co. v. Whitlow's Adm'r, 105 Ky., 1	10
Louisville & Nashville R. R. Co. v. Whitlow's Adm'r, 114 Ky. 470,	10
Louisville & N. R. Co. v. Western Union Tel. Co., 207 Fed., 1....	704
Lyle v. National Home for D. U. S., 170 Fed., 846.....	280

Mc

McCarthy v. Travelers' Ins. Co., 8 Biss., 362.....	676
McClung v. Ross, 5 Wheat. (U. S.), 116.....	186
McCormick v. McElligott, 127 Pa., 230.....	152
McCullock v. McCullock, 69 Tex., 682.....	38
McDonald v. Magruder, 3 Pet., 474.....	469
McGahey v. State of Virginia et al., 135 U. S., 662.....	171
McGlinchey v. Fidelity & Casualty Co., 80 Me., 251.....	677
McKee v. Judd, 12 N. Y., 622.....	7
McKee v. Tourtellotte, 167 Mass., 69.....	140
McNeil v. Commonwealth, 12 Bush. (Ky.), 727.....	647
McReynolds v. Counts, 9 Grat. (Va.), 242.....	156

M

Margolys v. Goldstein, 96 N. Y., Supp., 185.....	683
Manufacturers' Bottle Co. v. Taylor Stites Glass Co., 208 Mass., 593.....	428
Market St. Ry. Co. v. Penn. Ry. Co., 51 Cal., 583.....	115
Marlowe v. Commonwealth, 142 Ky., 106.....	124
Marston v. Lawrence, 1 Johns Cas., 397.....	429
Martin v. Tyler, 4 N. D., 278.....	689
Mayer v. Walker, 214 Pa., 440.....	152
Mehlos v. Milwaukee, 156 Wis., 591.....	96
Mergenthaler-Horton Basket Mach. Co. v. Lyon, 28 Ky., Law Rep., 471.....	140
Mill v. Brown, 31 Utah, 473.....	124
Miller v. Hurford, 11 Neb., 377.....	647
Mobile etc., R. Co. v. Postal Tel. Co., 76 Miss., 731.....	719
Moorman v. Gibbs, 75 Iowa, 537.....	428
Mobile, etc., R. Co. v. Postal Tel. Co., 120 Ala., 21.....	719
Mondou v. New York, N. H. & H. R. Co., 223 U. S., 1.....	25
Mo. Pac. Ry. Co. v. Bradley, 51 Neb., 596.....	27
Mo. Pac. R. Co. v. Lewis, 24 Neb., 848.....	27
Murray v. Board of Com., 81 Minn., 359.....	453

Murch v. Johnson, 203 Fed., 1	264
Murphy v. American Rubber Co., 159 Mass., 266	49
Musselman v. Oakes, 19 Ill., 81	349
Mutual Acc. Ass'n v. Barry, 131 U. S., 100	678

N

Nash v. Nash, 2 Maddock, 133	355
Nashville, etc., R. Co. v. Hubble, 140 Ga., 368	427
Nat. Bank of Commerce v. Pick, 13 N. D., 74	143
National Express Co. v. Burdette, 7 App., D. C., 551	428
Newark v. Varona Township, 59 N. J. Law, 94	283
New York C. R. Co. v. Lockwood, 17 Wall., 357	599
Nichols v. State Bank, 45 Minn., 102	428
Niskern v. United Brotherhood, 93 App. Div., 364	676
Norfolk, etc., R. Co. v. Nunnally, 88 Va., 546	429
North Am. Life & A. Ins. Co. v. Burroughs, 69 Pa., 43	678

O

O'Beirne v. Lloyd, 31 N. Y., Super Ct., 19	428
O'Brien v. Union Freight R. Co., 36 L. R. A. (N. S.), 492	265
Ohio v. Thomas, 172 U. S., 276	280
Oliver v. Northern P. R. Co. (D. C.), 196 Fed., 432	602
Omaha Packing Co. v. Sanduski, 155 Fed., 897	47
Omaha Water Co. v. Omaha, 162 Fed., 225	280
O'Neil v. Carey, 8 U. C. & C. P., 339	8
Orient Ins. Co. v. Daggs, 172 U. S., 562	88
Orr's Administrator v. Orr, 157 Ky., 570	143
Overholser v. National Home for D. U. S., 68 Ohio St., 236	280
Owens v. Andrews, 17 N. M., 597	320

P

Page v. Mitchell, 37 Minn., 368	428
Pasadena v. Stimson, 91 Cal., 238	453
Pascoag Bank v. Hunt, 3 Edw. Ch., 583	251
Patterson v. Ocean Acc. & Guaranty Co., 25 App. D. C., 46	678
Patterson v. Wollmann, 5 N. D., 608	113
Payne v. Benham, 16 Tex., 364	429
Pegg v. Pegg, 165 Mich., 228	71
Penn. R. R. Co. v. Nat. R. R. Co., 23 N. J. Eq., 441	112
People v. Coolidge, 124 Mich., 664	96
People's Gas Co. v. Tynor, 131 Ind., 277	119
People v. Hatch, 33 Ill., 135	648
People v. Pullman Palace Car Co., 175 Ill., 125	338
People v. Sacramento Drainage Dist., 155 Cal., 373	689
Peoria v. Pekin Union Ry. Co., 105 Ill., 110	707
Pervangher v. Casualty, etc., Co., 85 Miss., 31	678
Peterson v. Butte, 44 Mont., 129	428
Peters v. Peters, 156 Cal., 32	60
Phillips v. Barnett, 1 Q. B. D., 436	60

Pinney v. First Nat. Bank of Concordia, 68 Kan., 223.....	549
Pittman v. Pittman, 27 L. R. A. (N. S.), 605.....	153
Pitts v. Curtis, 4 Ala., 350.....	7
Porter v. Kingsbury, 77 N. Y., 164.....	428
Postal Tel. Co. v. Oregon etc., R. Co. (C. C.), 104 Fed., 623.....	714
Postal Tel. Co. v. Oregon, etc., R. Co. (C. C.), 114 Fed., 787.....	719
Potts v. Railroad Co., 119 Pa., 278.....	559
Provident Institution v. Malone, 221 U. S., 660.....	93

R

Railroad v. Post Tel. Co., 76 Miss., 731.....	708
Railroad v. Postal Tel. Co., 173 Ill., 535.....	707
Ramsdell v. Tewksbury, 73 Me., 197.....	493
Raritan & Delaware Bay R. R. Co. v. Delaware & Raritan Canal Co., 18 N. J. Eq., 546.....	112
Rector v. Hartford Deposit Co., 190 Ill., 380.....	339
Re Devlin (D. C.), 180 Fed., 170.....	725
Re Mayo, 60 S. C., 401.....	27
Re New York, 99 N. Y., 569.....	283
Reiter-Connolly Mfg. Co. v. Hamlin, 144 Ala., 192.....	27
Reynolds v. Crawfordsville First Nat. Bank, 112 U. S., 405.....	341
Reynolds v. United States, 98 U. S., 145.....	212
Richards v. Riverside Iron Works., 56 W. Va., 510.....	28
Rivera v. Atchison, T. & S. F. Ry. Co. (Tex. Civ. App.), 149 S. W., 223.....	28
Riverside Milling, etc., Co. v. Bank, 141 Ga., 578.....	476
Roberts v. Williams, 15 Ark., 43.....	274
Robinson v. Baltimore & Ohio R. Co., 237 U. S., 84.....	601
Robinson v. Swope, 12 Bush. (Ky.), 21.....	274
Rodney v. Travelers' Ins. Co., 3. N. M. (Gild.), 543.....	678
Rogers v. Hoskins, 15 Ga., 270.....	427
Rooks v. Tindall, 138 Ga., 863.....	124
Roller v. Holly, 176 U. S., 398.....	532
Rose v. Commercial Mut. Acc. Co., 12 Pa., Super. Ct., 394.....	676

State

State Bank v. Kahn, 49 Misc., Rep., 500.....	471
State, etc., v. Bishop, 39 N. J. Law, 226.....	274
State v. Foster, 29 L. R. A., 226.....	726
State v. Hamer, 42 N. J. Law, 440.....	415
State v. Hines, 148 Mo. App., 298.....	428
State v. Howell (Wash.), 147 Pac., 1159.....	97
State v. Michel, 52 La. Ann., 936.....	647
State v. South Norwalk, 77 Conn., 257.....	649

S

Safe Deposit, etc., Co. v. Fricke, 152 Pa., 231.....	453
Salmon Co. v. Box Co., 158 Cal., 567.....	683

Sandoe's Appeal, 65 Pa., 314.....	156
Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Bros. Construc- tion Co., 228 U. S., 177.....	601
Schultz v. Christopher, 65 Wash., 496.....	60
Schultz v. Schultz, 89 N. Y. 644.....	60
Scott v. Hawk, 107 Iowa, 723.....	56
Scott v. Hillenberg, 85 Va., 245.....	39
Sears v. Sears, 45 Tex., 557.....	487
Selig v. Hamilton, 234 U. S., 652.....	534, 536
Shanberg v. Fidelity & Casualty Co. (C. C.), 143 Fed., 651.....	676
Shaver v. Starrett, 4 Ohio St., 494.....	275
Shepard Land Co. v. Banigan, 36 R. I., 25.....	570
Sherman v. Buick, 32 Cal., 241.....	275
Silberstein v. Guttridge, 80 N. J. Law, 117.....	577
Simpson v. Westminster Palace Hotel Co., 8 Ho. Lords Cas., 712..	340
Simson v. Parker, 190 N. Y., 19.....	283
Singer v. Scott, 44 Ga., 659.....	427
Slingerland v. Newark, 54 N. J. Law, 62.....	283
Sloss-Sheffield Steel Co. v. Johnson, 147 Ala., 384.....	118
Smith v. Travelers' Ins. Co., 219 Mass., 147.....	676
Smith v. White, 7 Hill, 520.....	429
Smouse v. Iowa St. Traveling Men's Ass'n, 118 Iowa, 436.....	676
Southard v. Railway Passengers, etc., Co., 34 Conn., 576.....	676
Southern Indiana R. Co. v. Harrell, 161 Ind., 689.....	49
Southworth v. Isham, 5 N. Y. Super. Ct., 448.....	517
Spaulding v. Evans, Fed. Cas. No. 13, 216.....	349
Spaulding v. Lowell, 23 Pick. (Mass.), 71.....	283
Staloch v. Holm, 100 Minn., 276.....	328
Standard Life & Acc. Ins. Co. v. Schmaltz, 66 Ark., 588.....	677
St. Clare v. Cox, 106 U. S., 350.....	536
Stewart v. B. & O. R. Co., 168 U. S., 445.....	28
St. Louis, etc., R. Co. v. Postal Tel. Co., 173 Ill., 508.....	707
Stout v. Pac. Mut. L. Ins. Co., 130 Cal., 471.....	678
Strawn v. Harris, 54 Or., 424.....	451
Strom v. Strom, 98 Minn., 427.....	59
Strong v. Didnan, 207 Ill., 385.....	453
Sturm v. Boker, 150 U. S., 312.....	568
Supter v. Carter, 115 Ga. 893.....	152
Swearingen v. Consolidated Troup Min. Co., 212 Mo., 524.....	140

T

Taylor v. Gen. Acc. Corp., 208 Pa., 439.....	678
Texas, etc., R. Co. v. Kenna (Tex. Civ. App.), 52 S. W., 555.....	429
The Taxicab Cases, 82 Misc. Rep., 94.....	92
Thompson v. Thompson, 218 U. S., 611.....	59
Thornton v. Mulquinne, 12 Iowa, 549.....	8
Three States Buggy, etc., Co. v. Com., 32 Ky. Law Rep., 385.....	568

Toland v. Tichenor, 3 Rawle, 320.....	429
Travelers' Ins. Co. v. Selden, 78 Fed., 285.....	676
Trawick v. Martin Brown Co., 74 Tex., 522.....	429
Trivette v. Railroad, 212 Fed., 641.....	264
Trow Printing, etc., Co. v. New York Book Binding Co., 3 N. Y. Supp., 59.....	429
Tugwell v. Ferry Co., 74 Tex., 480.....	114

U

Union Pac. R. Co. v. Colorado Postal, etc., Co., 30 Colo., 133.....	714
United States v. Rundle, 107 Fed., 227.....	723
United States v. State Bank, 6 Pet. (31 U. S.), 29.....	725
U. S. v. Canal Bank, 3 Story, 79.....	726
U. S. v. Hooe, 7 U. S., 73.....	725
U. S. v. Inlots, Fed. Cas., No. 15, 441 a.....	559
U. S. v. Williamson, 5 Dillon, 275.....	726

V

Vanarsdale v. Laverty, 69 Pa., 103.....	460
Vance v. Southern Ry. Co., 138 N. C., 460.....	28
Van Cleve v. Passaic, etc., Com., 71 N. J. Law, 183.....	450
Van Doren v. Pa. R. R. Co., 93 Fed., 260.....	10
Van Wyck v. Aspinwall, 17 N. Y., 190.....	463

W

Wallace v. Wallace, 137 Iowa, 37.....	38
Walker v. L. & N. R. R. Co., 111 Ala., 233.....	510
Walrad v. Petrie, 4 Wend. (N. Y.), 575.....	349
Warder v. Henry, 117 Mo., 530.....	428
Wasey v. Whitcomb, 167 Mich., 58.....	568
Washington Asphalt Block & Tile Co. v. Mackey, 15 App. D. C., 410.....	27
Waterman v. Mackenzie, 138 U. S., 252.....	550
Watkins v. Otis, 2 Pick. (19 Mass.), 88.....	726
Watson v. Campodonico, 3 Higgins, 698.....	669
Watson v. Pipes, 32 Miss., 451.....	56
Weinman v. Railway Co., 118 Pa., 192.....	454
Weitzmann v. Barber Asphalt Co., 190 N. Y., 452.....	268
Western & Atlantic R. Co. v. Western Union Tel. Co., 138 Ga., 420.....	704, 714
Western Union Telegraph Co. v. Lipscomb, 22 App. D. C., 104.....	27
Western Union Tel. Co. v. Richmond, 224 U. S., 160.....	704
Western Union Tel. Co. v. Pennsylvania R. Co., 195 U. S., 540.....	704
White v. British Museum, 6 Bing., 310.....	54
White v. Nicholls, 3 How., 266.....	463
Whitesell v. Hill, 37 L. R. A., 834.....	329
Wieman v. Mabee, 45 Mich., 484.....	463

Williams v. Gilman, 71 Me., 21.....	330
Willoughby v. Willoughby, 5 N. H., 244.....	349
Wilson v. Babb, 18 S. C., 59.....	38
Wilson v. Frost, 186 Mo., 311.....	71
Wilson v. Hays, 109 Ky., 321.....	152
Wilson v. Hendee, 74 N. J. Law, 640.....	471
Wilson v. Milliken, 103 K. Y., 165.....	428
Wooley v. Zeman, 178 Ill. App., 369.....	683
Woods & Sons v. Carl, 203 U. S., 358.....	553
Wright v. Hicks, 15 Ga., 171.....	38
Wright v. Keifer, 131 Ill. App., 298.....	428
Wright v. Suydam, 72 Wash., 587.....	429
Wright v. Wright, 7 Bing., 457.....	54
W. U. T. Co. v. South, etc., R. Co., 184 Ala., 66	719

Y

Yellow Taxicab Co. v. Gaynor, 159 App. Div., 893.....	92
Young v. Gaus, 134 Mo. App., 166.....	143
Young v. Railway Mail Ass'n, 126 Mo. App., 325.....	678

CASES CITED AND DISTINGUISHED.

B

Barnum v. Le Master, 110 Tenn., 640	304
Boggers v. Boggers, 65 Tenn., 299	667
Bond v. State, 129 Tenn., 75	211
Briar Hill Collieries v. Gernt, 131 Tenn., 542	179
Brown's Adm'r v. Brown's Adm'r, 25 Tenn., 126	132
Burnett v. Layman, 130 Tenn., 423	326

C

Chenault v. Chenault, 37 Tenn., 248	667
Clark v. White, 32 Tenn., 540	272
Coal & Iron Co. v. Schwoon, 124 Tenn., 176	177, 180
Cole Mfg. Co. v. Collier, 95 Tenn., 116	70

D

Drewry et al. v. Nelms, 132 Tenn., 254	177
Dummer v. Pitcher, 2 My. & K., 262	356, 357

F

Fecheimer-Keiffer Co. v. Burton, 128 Tenn., 682-684	482
Ferguson v. Booth, 128 Tenn., 259	304
Ferguson v. Phoenix Cotton Mills, 106 Tenn., 236	47

G

Glass v. Howell, 70 Tenn., 50	70
Gourley v. Thompson, 34 Tenn., 387	8
Graham's Heirs v. Nelson, 24 Tenn., 605	177
Gross v. Disney, 95 Tenn., 592	178

H

Henderson v. Overton, 10 Tenn., 394	302
-----------------------------------------------	-----

K

King v. Coleman, 98 Tenn., 564	304
------------------------------------------	-----

M

Mahon v. State, 127 Tenn., 550-559	208
Marr v. Johnson, 17 Tenn., 1	470
Morris v. Moore & Hancock, 30 Tenn., 433	312
Motlow v. State, 125 Tenn., 547	89

N

Nailing v. Nailing, 34 Tenn., 630	411
---------------------------------------------	-----

xxxiv CITED AND DISTINGUISHED. [133 Tenn.

P

Parlow v. Turner, 132 Tenn., 339.....	62
Perry v. Pearson & Anderson, 20 Tenn., 431-439.....	301
Pile v. Pile, 74 Tenn., 512.....	353
Prewitt v. Bunch, 101 Tenn., 723.....	131

R

Ruffin v. Johnson, 52 Tenn., 604.....	303
---------------------------------------	-----

S

Shy v. Shy, 54 Tenn., 125.....	671
Simmons v. Leonard, 91 Tenn., 183.....	53
Slover v. Union Bank, 115 Tenn., 347.....	171
Smith v. Harrison, 49 Tenn., 230-247.....	411
State v. Cooper, 120 Tenn., 549.....	63, 73
State ex rel. v. Kilvington, 100 Tenn., 227.....	124
State v. Lancaster, 119 Tenn., 638.....	380
Stuart v. State, 60 Tenn., 177.....	211

T

Talley v. Courtney, 48 Tenn., 715.....	301
----------------------------------------	-----

W

Wallace v. Greenlaw, 77 Tenn., 115.....	470
Walker v. Bobbitt, 114 Tenn., 7.....	314, 315
Whitworth v. Hager, 124 Tenn., 355.....	17
Wilson v. Bass, 6 Tenn., 110.....	302

CASES CITED AND DISAPPROVED.

C

Com. v. Parlin, 118 Ky., 168..... 566

H.

Harrell v. Peters Cartridge Co., 44 L. R. A. (N. D.), 1094..... 566

Hessig-Ellis Drug Co. v. Sly, 83 Kan., 60..... 566

L

L. & N. R. R. Co. v. Herb, 125 Tenn., 408..... 34

S

Stein Double Cushion Tire Co. v. Wm. Fulton Co. (Tex. Civ. App.),
159 S. W., 1013..... 566

Sucker State Drill Co. v. Wirtz, 17 N. D., 313..... 566

OTHER CASES CITED AND DISTINGUISHED.

A

Allen v. Tyson-Jones Buggy Co., 91 Tex., 22.....	566
American Telephone, etc., Co. v. St., Louis etc., R.Co., 202 Mo., 656, 708	
Amparo Mining Co. v. Fidelity Trust Co., 74 N. J. Eq., 197....	528, 538

B

Baltimore & Ohio S. W. Ry. Co. v. Voight, 176 U. S., 498.....	598
Bank of British N. A. v. Ellis (C.C.), 2 Fed., 44.....	475
Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed., 1.....	565

C

Campbell v. Drake, 39 N. C., 94.....	249
Chalcraft v. Railroad Co., 113 Ill., 88.....	242
Chicago, etc., R. Co. v. Dresel, 110 Ill., 80.....	557
Columbia Finance, etc., Co. v. Ky. Un. R. Co., 60 Fed., 794.....	658
Com. v. Covington, 128 Ky., 36.....	281
Condit v. Bigalow, 64 N. J. Eq., 504.....	303

D

Demorest v. Hopper, 22 N. J. Law, 599.....	303
Dennick v. Central R. R. Co., 103 U. S., 11.....	33
Draper v. Mackay, 35 Ark., 497.....	119

E

Eingartnef v. Illinois Steel Co., 94 Wis., 70.....	29
Escabana Mfg. Co. v. O'Donnell, 212 Fed., 648.....	264
Ex Parte Cardinal (Cal.), 150 Pac., 348.....	93
Ex Parte Rushforth, 10 Vesey, Jr., 409.....	661

F

Fairman v. Ives, 5 B. & Ald., 642.....	464, 465
----------------------------------------	----------

G

Glendenning v. Stahley, 173 Ind., 674.....	558
Goodman v. Niblack, 102 U. S., 556.....	533
Goudie v. Foster, 202 Mass., 226.....	48

H

Hagar v. Reclamation District, 111 U. S., 701.....	690
Harrison v. Bush, 5 Ellis & Blackb., 344.....	464
Hattaway v. Atlanta Steel, etc., Co., 155 Ind., 507....	48

133 Tenn.] OTHER CASES DISTINGUISHED xxxvii

Hoffard v. Illinois Cent. R. Co., 138 Iowa, 543	81
Holly v. Brown, 14 Conn., 266	518

I

Illinois Central R. Co. v. Behrens, 233 U. S., 473	230
Illinois Cent. R. Co. v. Rogers, 221 Fed., 52	230
In re Lowham's Estate, 30 Utah, 436	28

J

Jones v. Knappen, 63 Vt., 391	156
-----------------------------------------	-----

K

Knight v. West Jersey R. Co., 108 Pa., 250	29
------------------------------------------------------	----

L

Lindsley v. National Carbonic Gas Co., 220 U. S., 61	89
Louisville & N. R. Co. v. Westerns Union Tel. Co., 207 Fed., 1	713

M

Martin v. Maine Central R. Co., 83 Me., 100	303
M. P. R. R. Co. v. Lewis 24 Neb., 848	33

N

Nelson, Admr, v. Chesapeake & Ohio R. Co., 88 Va., 971	29
New Jersey Midland R. Co. v. Wortendyke, 27 N. J. Eq., 658	658
Newton v. Porter, 69 N. Y., 133	251
New York Cent. & Hudson R. Co., v. Carr, 238 U. S., 260	230
North Carolina R. Co. v. Zachary. 232 U. S., 248	230

O

Osborn v. Cook, 11 Cush., (Mass.), 532	55
--------------------------------------------------	----

P

Pedersen v. Delaware, etc., R. Co., 229 U. S., 146	230
Pennoyer v. Neff, 95 U. S., 714	536, 546
Perth Amboy v. Barker, 74 N.J. Law, 127	282
Printing & N. Registering Co. v. Sampson, L. R., 19 Eq., 465	599
Pullman Palace Car Co. v. Lawrence, 74 Miss., 782	29
Purdy v. R. W. & O. R. R. Co., 125 N. Y., 209	602

R

Reclamation District v. Hagar, 66, Cal., 54	690
Riehl v. Evansville Foundry Association, 104 Ind., 70	253
Runt v. Herring, 2 Misc. Rep., 105	603

S

Shaw v. State, 97 Ind., 23	690
Smith County v. Labore, 37 Kas., 480	558

xxxviii OTHER CASES DISTINGUISHED [133 Tenn

Southern Pacific Co. v. De Valle Da Costa, 190 Fed., 689..... 28
St. John v. New York, 201 U. S., 633..... 93
St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S., 156..... 230

T

Thompson v. Norman Paper Co., 169 Mass., 416..... 47

W

Western Union Tel. Co. v. L. & N. R. Co. (D. C.), 201 Fed., 949. 712
Wilson v. Frost, 186 Mo., 311..... 73

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1915.

(Continued from Vol. 132.)

JOSEPH SHARP v. CINCINNATI, N. O. & T. P. Ry. Co.*

(Knoxville. September Term, 1915.)

- 1. EXECUTORS AND ADMINISTRATORS. Jurisdiction to appoint. Existence of "as sets." "Chattel." "Goods and chattels." "Estate." "Goods, chattels, or assets or any estate, real or personal." "Chose in action."**

Under Shannon's Code, sec. 3935, providing that letters of administration may be granted upon the estate of a nonresident by the county court of any county where deceased had any goods, chattels, or assets or any estate, real or personal, at the time of his death, or where the same may be when the letters are applied for, or where any suit is to be brought, prosecuted, or defended in which the estate is interested, an administrator may be appointed in the county in which the decedent was

*As to what assets will give jurisdiction to appoint administrator see notes in 24 L. R. A., 684, L. R. A., 1915D, 856.

As to what law determines the right of action for death see note in 56 L. R. A., 195.

Sharp v. C., N. O. & T. P. Ry. Co.

wrongfully killed, though the cause of action for the wrongful death is the only asset in the county, and there are no technical assets. Since the word "chattels" includes not only personal property in possession, but choses in action, the term "goods and chattels" is of very wide signification, and includes choses in action. The term "choses in action" includes rights of action for tort. The word "assets," as used in the administration statutes, though usually meaning items subject to payment of the debts of the decedent, is not wholly limited to this meaning, but has been applied to money collected by an administrator as damages for the wrongful killing of an intestate. The word "estate," though in its primary and technical sense referring only to an interest in land, as used with reference to a decedent's property, has acquired a wider application in a popular sense and refers to the entire mass of decedent's property, both real and personal, while the words "goods, chattels, or assets or any estate, real or personal," include every kind of property of any nature whatsoever, and are not limited to technical assets subject to the payment of debts. (*Post*, pp. 5-9.)

Cases cited and approved: *Pitts v. Curtis*, 4 Ala., 350; *McKee v. Judd*, 12 N. Y., 622; *Agee v. Saunders*, 127 Tenn., 680; *Thornton v. Mulguinne*, 12 Iowa, 549; *Bridgewater v. Bolton*, 6 Mod., 106; *O'Neil v. Carey*, 8 U. C. & C. P., 339; *Harrison v. Lamar*, 33 Ark., 824.

Cases cited and distinguished: *Glass v. Howell*, 70 Tenn., 50; *Gourley v. Thompson*, 34 Tenn., 387.

Code cited and construed: Sec. 3935 (S.).

2. EXECUTORS AND ADMINISTRATORS. Jurisdiction to appoint. Statutory provisions. "Estate."

The word "estate," as used in Shannon's Code, sec. 3935, subd. 4, authorizing the appointment of an administrator of the estate of a nonresident in any county where any suit is to be brought, prosecuted, or defended in which the estate is interested, means the whole legal entity which may be the subject of devolution on the legatees, devisees, heirs, or distributees of a decedent, under the laws of a State or government, which, under such

Sharp v. C., N. O. & T. P. Ry. Co.

laws, may be attacked or defended, or to obtain which, a suit may be brought. (*Post*, p. 9.)

3. DEATH. Actions for cause of death. Nature.

The right of action for wrongful death given by Shannon's Code, sec. 4025 *et seq.*, is that which the deceased would have had if he had lived, and the recovery is in right of the deceased. (*Post*, pp. 9, 10.)

Cases cited and approved: Davidson Benedict Co. v. Severson, 109 Tenn., 572; Stuber v. Railroad, 113 Tenn., 305.

4. DEATH. Actions for wrongful death. Law governing.

A right of action for wrongful death is governed by the laws of the State where the injury occurred. (*Post*, pp. 10-16.)

Acts cited and construed: Acts 1871, ch. 78, sec. 2; Acts 1903, ch. 317.

Cases cited and approved: Nashville & Chattanooga R. R. Co. v. Eakin, 46 Tenn., 582; Nashville & Chattanooga R. R. Co. v. Sprayberry, 56 Tenn., 852; *Id.*, 67 Tenn., 341; Hobbs v. Memphis & Charleston R. R. Co., 56 Tenn., 873; Railroad v. Foster, 78 Tenn., 351; Whitlow v. N. C. & St. L. Ry. Co., 114 Tenn., 344; Erickson v. Pacific Coast S. S. Co. (C. C.), 96 Fed., 80; Owen v. Ray, 108 Fed., 320; Van Doren v. Pa. R. R. Co., 93 Fed., 260; Leman v. Baltimore & O. R. R. Co. (C. C.), 128 Fed., 191; Davidow v. Pa. R. R. Co. (C. C.), 85 Fed., 943; *In re* Coe's Estate, 130 Iowa, 307; Louisville & Nashville R. R. Co. v. Whitlow's Adm'r, 105 Ky., 1; *Id.*, 114 Ky., 470; C., O. & S. W. R. R. Co. v. Higgins, 85 Tenn., 620; Bledsoe v. Stokes, 60 Tenn., 312; Flatley v. M. & C. R. R. Co., 56 Tenn., 230; Trafford v. Adams Express Co., 76 Tenn., 96; Loague v. Railroad, 91 Tenn., 458-460; Holston v. Coal & Iron Co., 95 Tenn., 521; Anderson v. Louisville & N. R. Co., 128 Tenn., 244; Railroad v. Herb, 125 Tenn., 408.

Code cited and construed: Secs. 2291-2293 (1858); Sec. 4027 (S.).

5. STATUTES. Revisions and compilations. Construction.

Though the substance of Shannon's Code, sec. 3935, relative to the jurisdiction to appoint administrators of the estates of

Sharp v. C., N. O. & T. P. Ry. Co.

nonresidents was enacted prior to the Code of 1858, with which the right of action for wrongful death originated, it having been made a part of that Code along with the sections giving the right of action for wrongful death, they must be construed together as if they had originated with the Code, as that Code was a single enactment. (*Post*, pp. 16-18.)

Acts cited and construed: Acts 1831, ch. 24; Acts 1841-42, ch. 69.

Cases cited and approved: Chapman v. State, 39 Tenn., 36; Brien v. Robinson, 102 Tenn., 157; State v. Runnels, 92 Tenn., 320; Trust Co. v. Weaver, 102 Tenn., 66; Padgett v. Ducktown, etc., Iron Co., 97 Tenn., 690.

Cases cited and distinguished: Whitworth v. Hager, 124 Tenn., 355.

Code cited and construed: Sec. 3935 (S.); sec. 2203 (1858).

FROM SCOTT

Appeal from the Criminal and Law Court of Scott County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—XEN. HICKS, Judge.

E. G. FOSTER and PICKLE, TURNER & KENNERLY, for plaintiff.

H. M. CARR, for defendant.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

This case was originally brought in the county court of Scott county to revoke the letters of administration previously granted to petitioner Joseph Sharp, as ad-

Sharp v. C., N. O. & T. P. Ry. Co.

ministrator of Charles B. Wilson. A judgment was granted in the county court revoking the letters, and on appeal to the circuit court this judgment was affirmed, and subsequently on appeal to the court of civil appeals was there again affirmed. The case has now reached us in regular course under the writ of *certiorari*.

The ground of recall in the several courts was that the decedent was a nonresident of this State, and had no assets in Scott county, and the county court was therefore without jurisdiction to grant letters of administration upon his estate.

Wilson was killed in Scott county, Tennessee, in an accident on the line of the defendant railway company, alleged to have been due to the negligence of the railway company. The railway company is a corporation of the State of Ohio. It is alleged that deceased was a citizen of the State of Kentucky. He left no assets or property in Scott county except the cause of action arising from his alleged wrongful death. The action of the court of civil appeals in revoking the letters is assigned as error.

The question is whether a county court of this State has jurisdiction to appoint an administrator for the estate of a nonresident who died as the result of an injury which was tortiously inflicted upon him in the county in which administration is sought, where it appears the decedent left no other property or estate in that county, except the right of action for the wrongful death.

Sharp v. C., N. O. & T. P. Ry. Co.

The solution of this question depends upon the construction of section 3935 of Shannon's Code (Code of 1858, sec. 2203), which reads as follows:

"Letters testamentary or of administration may be granted upon the estate of a person who resided, at the time of his death, in some other State or territory of the Union, or in a foreign country, by the county court of any county in this State:

"(1) Where the deceased had any goods, chattels, or assets, or any estate, real or personal, at the time of his death, or where the same may be when said letters are applied for.

"(2) Where any debtor of the deceased resides.

"(3) Where any debtor of a debtor of the deceased resides, his debt being unpaid when the application is made.

"(4) Where any suit is to be brought, prosecuted, or defended, in which said estate is interested."

The word "chattels," used in the first subsection, includes not only personal property in possession, but choses in action. Cyc. Law Dict.

In Cyc. the word "chattels" is thus defined:

"Every species of property, movable or immovable, which is less than a freehold." Volume 7, p. 122.

So of the term "goods and chattels." This expression is of very wide signification, and, among many other things, includes choses in action as well as those in possession. 20 Cyc. 1268-1270. The term "choses in action" includes rights of action for tort. Cyclo-

Sharp v. C., N. O. & T. P. Ry. Co.

pedic Law Dict. 149; *Pitts v. Curtis*, 4 Ala., 350; *McKee v. Judd*, 12 N. Y., 622, 64 Am. Dec., 515.

The words "assets," as used in our administration statutes, usually means items subject to payment of the debts of the decedent. *Agee v. Saunders*, 127 Tenn., 680, 157 S. W., 64, 46 L. R. A. (N. S.), 788. Still it is not wholly limited to this meaning, but has been applied to money collected by an administrator as damages for the wrongful killing of an intestate, since the administrator owes a duty to distributees as well as to creditors. This court said on the subject, in *Glass v. Howell*, 70 Tenn. (2 Lea), 50, 52:

"It is argued that the right of action for damages resulting in the death of an intestate is not assets with which an administrator is officially chargeable. But this is directly in conflict with the statute which expressly provides that the right of action for injuries resulting in death shall survive and pass to the personal representative. Code, sec. 2291. It is true he may decline to sue, in which case the next of kin may use his name by giving security for costs. Code, sec. 2292. The reason is that there may be no assets with which to pay costs, and the personal representative may decline to actively proceed without security, and as, by the statute, the recovery inured to the next of kin, free from the claims of creditors, the next of kin were authorized to sue in his name, upon indemnifying him against costs. If he acted, and received the fund, it would undoubtedly be as administrator."

Sharp v. C., N. O. & T. P. Ry. Co.

Furthermore, there are many estates which owe no debts, and still it is proper to have an administrator to take charge of all of the personal property, realize on it, and divide the proceeds among the distributees.

Of the word "estate" it is said:

"While in its primary and technical sense the term estate refers only to an interest in land, yet by common usage it has acquired a much wider import and application, being applied to personal property as well as realty, and in its most extreme sense signifying everything of which riches or fortune may consist." 16 Cyc. 599, 600.

In the notes to the text it is said:

"The word 'estate' is *genus generalissimum* and includes all things real and personal. *Thornton v. Mulquinne*, 12 Iowa, 549, 79 Am. Dec., 548; *Bridgewater v. Bolton*, 6 Mod., 106; 1 Salk., 236; *O'Neil v. Carey*, 8 U. C. & C. P., 339."

The word "estate," as used with reference to a decedent's property, has acquired a wider application in a popular sense and refers to the entire mass of the decedent's property, both real and personal. *Harrison v. Lamar*, 33 Ark., 824.

Finally, in our own case of *Gourley v. Thompson*, 34 Tenn. (2 Sneed), 387, 393, it is said:

"The word 'estate,' unqualified or unrestricted, is always construed to embrace every description of property, real, personal, and mixed."

Taking together all the words referred to as used in subsection 1, viz., "goods, chattels, or assets, or any

Sharp v. C., N. O. & T. P. Ry. Co.

estate real or personal," we think it was the intention of the legislature to include every kind of property of any nature whatsoever and that they cannot be limited merely to technical assets subject to the payment of debts.

Subsection 4, as if to remove any ambiguity that might reside in the very extensive expressions already referred to, specifies that administration may be had in any county where any suit is to be brought, prosecuted, or defended in which "said estate" is interested. By the word "estate," as used in this latter subsection, is meant the whole legal entity which may be the subject of devolution on the legatees, devisees, heirs, or distributees of a decedent under the operation of the laws of a State or government, and which, under such laws, may be attacked or defended, through forms prescribed by law, or to obtain which a suit may be brought.

We think there is no doubt that the right of action which arose in the present case to the estate of Wilson by reason of his wrongful death was a part of his estate, and that an administrator could be properly appointed in Scott county, where he was killed, to recover therefor. It has been abundantly held in this State that the right of action under the Code sections referred to is that which the deceased would have possessed if he had lived, and the recovery is in right of the deceased. *Davidson Benedict Co. v. Severson*, 109 Tenn., 572, 613-623, 72 S. W., 967, inclusive, and cases

Sharp v. C., N. O. & T. P. Ry. Co.

cited; *Stuber v. Railroad*, 113 Tenn., 305, 87 S. W., 411.

The injury having occurred in this State, the right of action would be governed by the laws of this State. The universal rule is that this right of action is governed by the laws of the State where the injury occurred. *Nashville & Chattanooga R. R. Co. v. Eakin*, 46 Tenn. (6 Cold.), 582; *Nashville & Chattanooga R. R. Co. v. Sprayberry*, 56 Tenn. (9 Heisk.), 852, 856; *Id.*, 67 Tenn. (8 Baxt.), 341, 35 Am. Rep., 705; *Hobbs v. Memphis & Charleston R. R. Co.*, 56 Tenn. (9 Heisk.), 873; *Railroad v. Foster*, 78 Tenn. (10 Lea), 351; *Whitlow v. N. C. & St. L. Ry. Co.*, 114 Tenn. (6 Cates), 344, 84 S. W., 618, 68 L. R. A., 503; *Erickson v. Pacific Coast S. S. Co.* (C. C.), 96 Fed., 80; *Cowen v. Ray*, 108 Fed., 320, 47 C. C. A., 352; *Van Doren v. Pa. R. R. Co.*, 93 Fed., 260, 35 C. C. A., 282; *Leman v. Baltimore & O. R. R. Co.* (C. C.), 128 Fed., 191; *Davidow v. Pa. R. R. Co.* (C. C.), 85 Fed., 943; *In re Coe's Estate*, 130 Iowa, 307, 106 N. W., 743, 4 L. R. A. (N. S.), 814, 114 Am. St. Rep., 416, 8 Ann. Cas., 148; *Louisville & Nashville R. R. Co. v. Whitlow's Adm'r*, 105 Ky., 1, 43 S. W., 711, 41 L. R. A., 614; *Id.*, 114 Ky., 470, 43 S. W., 711, 41 L. R. A., 614.

If not permitted to be sued on in this State, it probably could not be made the subject of an action anywhere, because each State enforces such rights of action accruing in any other State only through comity, and when the State in which the injury occurred does not recognize it as giving a right of action, there is

Sharp v. C., N. O. & T. P. Ry. Co.

nothing on which comity could rest. We should then have the singular result that the estate of no human being killed in this State by wrongful act, if the person was a nonresident at the time he was killed, could enforce a right of action against the wrongdoer anywhere unless the deceased left in this State some property other than the right of action for this wrongful death. This would create an exception to our statute allowing recoveries for death caused by wrongful act not warranted by anything in the statute itself; the statute being general in its terms.

That statute reads as follows:

“4025. The right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children or to his personal representative, for the benefit of his widow or next of kin, free from the claims of creditors.

“4026. The action may be instituted by the personal representative of the deceased; but if he decline it, the widow and children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit, or giving bond and security for costs, or in the form prescribed for paupers. The personal representative shall not, in such case, be responsible for costs, unless he sign his name to the prosecution bond.

Sharp v. C., N. O. & T. P. Ry. Co.

“4027. The action may also be instituted by the widow in her own name, or, if there be no widow, by the children.

“4028. If the deceased had commenced an action before his death, it shall proceed without a revivor. The damages shall go to the widow and next of kin, free from the claims of the creditors of the deceased, to be distributed as personal property.”

The provisions of the Code of 1858 on the subject were these:

“2291. The right of action, which a person who dies from injuries received from another, or whose death is caused by the wrongful act or omission of another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death; but shall pass to his personal representative for the benefit of his widow and next of kin, free from the claims of his creditors.

“2292. The action may be instituted by the personal representative of the deceased; but if he decline it, the widow and children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit, on giving bond and security for costs, or in the form prescribed for paupers. The personal representative shall not in such case be responsible for costs, unless he sign his name to the prosecution bond.

“2293. If the deceased had commenced an action before his death, it shall proceed without a revivor. The damages shall go to the widow and next of kin,

Sharp v. C., N. O. & T. P. Ry. Co.

free from the claims of the creditors of the deceased, to be distributed as personal property.”

In 1903 an act was passed (chapter 317) which provided:

“That no suit now pending or hereafter brought for personal injuries or death from wrongful act in any of the courts of this State, whether by appeal or otherwise, and whether in an inferior or superior court, shall abate or be abated, because or on account of the death of the beneficiary or beneficiaries for whose use and benefit said suit was brought, and that such suit shall be proceeded with to final judgment, as though such beneficiary or beneficiaries had not died, for the use and benefit of the heirs at law of such deceased beneficiary.”

It is perceived that the right of action given is general, for the benefit of the widow, children, and next of kin, without respect to whether residents or nonresidents. Accordingly it has been held that a widow residing in a foreign State might bring her suit in this State to recover for the death of her husband wrongfully caused here. *Chesapeake, Ohio & Southwestern Railroad Co. v. Higgins*, 85 Tenn. (1 Pick.), 620, 4 S. W., 47. But the right of the widow and children to sue directly was first conferred by Acts 1871, ch. 78, sec. 2, embodied in Shannon's Code, sec. 4027. Prior to that time, under the sections of the Code of 1858 quoted, the action could be brought only by the administrator. *Bledsoe v. Stokes*, 60 Tenn. (1 Baxt.), 312, 314; *Flatley v. Memphis & Charleston Railroad Co.*,

Sharp v. C., N. O. & T. P. Ry. Co.

56 Tenn. (9 Heisk.), 230, 233, 234; *Trafford v. Adams Express Co.*, 76 Tenn. (8 Lea.), 96, 99; *Loague v. Railroad*, 91 Tenn. (7 Pick.), 458-460, 19 S. W., 430; *Holston v. Coal & Iron Co.*, 95 Tenn. (11 Pick.), 521, 522, *et seq.*, 32 S. W., 486. If plaintiff's contention be sound, then it must follow that prior to the act of 1871 there could be no recovery at all for the wrongful killing of a nonresident in this State, unless, as appeared in *Anderson v. Louisville & N. R. Co.*, 128 Tenn., 244, 159 S. W., 1086, there was found on his body, or otherwise in some county of this State, some personal property, even though small and comparatively inconsiderable, so that an administrator could be appointed. It would likewise follow, on the same theory, that after the act of 1871, a foreign widow and children could sue for the injury, but in case there were neither widow nor children, but other next of kin, these latter could have no remedy, because they could not sue without an administrator, and none could be appointed here, because no technical assets could be found here; that is, no property subject to debts. We should thus have imported into the statute, by construction, the new and important condition that, while the widow and children might recover regardless of the existence of technical assets in this State, there could be no recovery for the benefit of the next of kin other than children, unless there could be found in this State at least a few dollars' worth of property liable for debts. A theory leading to such a result cannot be sound.

Sharp v. C., N. O. & T. P. Ry. Co.

The error resides in the assumption that no administrator can be appointed here unless there be technical assets. This theory ignores the fact that the duty of taking possession of property, realizing on it, and paying to distributees rests on the administrator as well as the payment of debts, and that this duty exists even though there be no debts. It fails to accord the proper meaning to the broad terms "goods" and chattels," and improperly confines the term "estate" to assets subject to the payment of debts. As we have already shown, the term "assets" has a broader meaning under the statute we are considering.

We are referred to the case of *Railroad v. Herb*, 125 Tenn., 408, 143 S. W., 1138, as in conflict with what we have herein held. That case, so far as concerns the facts in decision, is not in conflict, since it appears that the injury which was the subject of that action occurred in Kentucky. However, the construction therein given to Shannon's Code, sec. 3935, is in conflict with the construction herein given, and we cannot adhere to it. We may add that *Railroad v. Herb*, is in conflict with two prior decisions of this court concerning the right of action for injuries resulting in death where the injuries occurred in a foreign State. *Railroad v. Foster*, supra, and *Whitlow v. Railroad*, supra. These cases are not referred to in *Railroad v. Herb*. In the case of *Railroad v. Foster* the action was brought by the administrator. It does not appear from the opinions in the cases where these administrators were appointed, but they must have been appointed in some

Sharp v. C., N. O. & T. P. Ry. Co.

county in Tennessee, since, under the rule well established at the time in this State, a foreign administrator was not permitted to sue. It does not distinctly appear in the *Whitlow Case* whether plaintiff was the administrator, but it is to be inferred from the Alabama statute quoted in the opinion that such was the case. In the *Sprayberry Case*, supra, suit was brought by a husband and father for the wrongful death of his wife and children, occurring in the State of Mississippi.

The three cases last referred to are in harmony with the great weight of authority elsewhere. The cases are so numerous that we shall not attempt to cite them. The rule is practically uniform in the States of the Union that suits will be entertained on rights of action for wrongful injuries causing death occurring in foreign States unless the statutes of the foreign States are penal in their nature, or contain provisions in conflict with the public policy of the State in which they are sought to be enforced. In some of the States the foreign administrator is permitted to sue, but generally an administrator is appointed in the State of the forum, as has always been the practice in Tennessee.

It is suggested that Shan. Code, sec. 3935 (Code of 1858, sec. 2203), copied supra, was taken from Acts 1831, ch. 24, and Acts 1841-42, ch. 69, and at that time the right of action for personal injuries resulting in death died with the injured party, and therefore they could not have been intended to cover a cause of action such as that sued on in the case before us, originating

Sharp v. C., N. O. & T. P. Ry. Co.

with the Code of 1858, and that for this reason such a claim could not be treated as assets. The argument is not sound. It is true the substance of the section was in the original acts referred to, but this section was made a part of the Code of 1858, along with the sections giving the right of action for wrongful death, and therefore they must be construed together, just as if they originated with the Code. The whole Code of 1858 was itself a single enactment, and went into effect as a whole on the 1st day of May, 1858. The title and enacting clause are as follows:

“An act to revise the statutes of the State of Tennessee.

“Be it enacted by the general assembly of the State of Tennessee, that the general statutes of the State of Tennessee shall be as follows.”

Then follows the whole Code as one act or body of laws. *Chapman v. State*, 2 Head (39 Tenn.), 36, 41; *Brien v. Robinson*, 102 Tenn., 157, 167, 52 S. W., 802; *State v. Runnels*, 92 Tenn., 320, 323, 324, 21 S. W., 665; *Trust Co. v. Weaver*, 102 Tenn., 66, 69, 50 S. W., 763; *Whitworth v. Hager*, 124 Tenn., 355, 360, 140 S. W., 205.

“While the court will presume, in doubtful cases, that it was not the intention of the compilers of the Code to change, but only to revise or compile, the old statutes, still, where the meaning of the Code is clear, by reason of its express terms, or as a matter of necessary implication, its provisions are the law of the State, without regard to the old statutes which may have

Sharp v. C., N. O. & T. P. Ry. Co.

been the basis of its provisions, and which it in express terms repeals." *Padgett v. Ducktown, etc., Iron Co.*, 97 Tenn., 690, 694, 695, 37 S. W., 698.

The result is the judgment of the court of civil appeals is reversed.

Howard v. Nashville, C. & St. L. Ry. Co.

MRS. MOLLIE HOWARD v. NASHVILLE, CHATTANOOGA &
ST. LOUIS RAILWAY CO.*

(Knoxville. September Term, 1915.)

1. EXECUTORS AND ADMINISTRATORS. Jurisdiction to appoint.
Existence of assets.

An administrator may be appointed to bring an action for wrongful death wherever the defendant may be found, though the decedent was a nonresident and left no assets in the State other than such right of action, and though he sustained the injuries causing his death in another State, as the right of action itself is property and is transitory, and exists wherever the defendant may be found. (*Post*, p. 23.)

Case cited and approved: Sharp, Adm'r., v. C., N. O. & T. P. Ry. Co., — Tenn., —.

2. COURTS. Jurisdiction. Transitory actions. Actions for wrongful death.

A right of action for wrongful death is transitory and may be enforced against the defendant wherever he may be found, provided it is not contrary to the policy of the forum and is allowed by the State wherein the injury occurred, except in those cases controlled by federal statutes. (*Post*, pp. 23-25.)

3. COMMERCE. Liability for injuries. Statutory provisions.

The federal Employers' Liability Act (Act April 22, 1908, ch. 149, 35 Stat. 65 [U. S. Comp. St. 1913, secs. 8657-8665]) in the cases to which it applies is necessarily supreme. (*Post*, pp. 25-35.)

Cases cited and approved: Mondou v. New York, N. H. & H. R. Co., 223 U. S., 1; Brown v. Railroad Co., 97 Ky., 228; Findlay v. Railroad Co., 106 Mich., 700; Hutchins v. Railroad Co., 44 Minn., 5; Reiter-Connolly Mfg. Co. v. Hamlin, 144 Ala., 192; Washington Asphalt Block & Tile Co. v. Mackey, 15 App. D.

*The note in 47 L. R. A. (N. S.), 48 referred to in the opinion on the federal employers' liability act is brought down in note in L. R. A., 1915C. 47.

 Howard v. Nashville, C. & St. L. Ry. Co.

C., 410; Western Union Telegraph Co. v. Lipscomb, 22 App. D. C., 104; Appeal of Jenkins, 25 Ind. App., 532; Mo. Pac. Ry. Co. v. Bradley, 51 Neb., 596; Boston, etc., R. Co. v. Hurd, 108 Fed., 116; Mo. Pac. R. Co. v. Lewis, 24 Neb., 848; Re Mayo, 60 S. C., 401; Jordan v. Chicago, etc., R. Co., 125 Wis., 581; Vance v. Southern Ry. Co., 138 N. C., 460; Richards v. Riverside Iron Works, 56 W. Va., 510; Fickelsen v. Wheeling Electrical Co., 67 W. Va., 335; Fann v. N. C. R. Co., 155 N. C., 136; Rivera v. Atchison, T. & S. F. Ry. Co. (Tex. Civ. App.), 149 S. W., 223; Gulf, C. & S. F. R. Co. v. Beezley (Tex. Civ. App.), 153 S. W., 651; Eastern Ry. Co. of New Mexico v. Ellis (Tex. Civ. App.), 153 S. W., 701; Hartford & N. H. R. Co. v. Andrews, 36 Conn., 214; Bruce v. Cincinnati R. Co., 83 Ky., 174; Anderson v. R. Co., 210 Fed., 689; Dennick v. Railroad Co., 103 U. S., 11; Stewart v. B. & O. R. Co., 168 U. S., 445; Dougherty v. American McKenna Process Co., Ann. Cas., 1913D; Lamphere v. Oregon R. & Nav. Co., 47 L. R. A. (N. S.), 48-84.

Cases cited and distinguished: In re Lowham's Estate, 30 Utah, 436; Pullman Palace Car Co. v. Lawrence, 74 Miss., 782; Knight v. West Jersey R. Co., 108 Pa., 250; Eingartner v. Illinois Steel Co., 94 Wis., 70; Nelson, Adm'r, v. Chesapeake & Ohio R. Co., 88 Va., 971; Southern Pacific Co. v. De Valle Da Costa, 190 Fed., 689; M. P. R. R. Co. v. Lewis, 24 Neb., 848; Dennick v. Central R. R. Co., 103 U. S., 11.

Case cited and disapproved: L. & N. R. R. Co. v. Herb, 125 Tenn., 408.

 FROM HAMILTON

Appeal from the Circuit Court of Hamilton County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
NATHAN L. BACHMAN, Judge.

THOMPSON, WILLIAMS & THOMPSON, for plaintiff.

Howard v. Nashville, C. & St. L. Ry. Co.

BROWN, SPURLOCK & BROWN, for defendant.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

In the early part of the year 1915, plaintiff's husband being engaged in the service of defendant, received at Bridgeport, Alabama, an injury from which he died eight hours later; in Chattanooga, Tennessee, to which place he had been at once removed, on the happening of the injury. The deceased was a resident of the State of Alabama at the time he was hurt. A few days after his death plaintiff, his widow, appeared before the county court of Hamilton county, Tennessee, and applied for and obtained letters of administration on his estate. She then brought an action against the defendant to recover damages for the alleged wrongful death. She filed her declaration containing several counts, one of these under the federal Employers' Liability Act, and one under the Alabama statute. This latter statute is substantially like our own on the same subject, but confers the right of action only on the administrator of the deceased. After the filing of the declaration the defendant moved the court to compel the plaintiff to elect between the right of action claimed under the federal Employers' Liability Act and that claimed under the Alabama statute. Before this motion was acted on, however, the defendant filed a petition in the county court of Hamilton county, praying that the letters of administration be recalled, on the ground that the decedent

Howard v. Nashville, C. & St. L. Ry. Co.

left no property or estate in Tennessee that could furnish a basis for the appointment. The plaintiff answered the petition, claiming that there existed certain small items of property, and the right of action against the railroad company for the wrongful death. The existence of the small items referred to was denied and contested, but we deem it unnecessary to incumber the record with a further reference to these matters. We shall assume that the deceased left no property, except the right of action against the railway company for the alleged wrongful death. The county court held that this could not be treated as a basis for administration in Tennessee, if unaccompanied by technical assets subject to the payment of the debts of the deceased, and therefore entered a judgment recalling the administration previously granted. On appeal to the circuit court of the county this judgment was affirmed. The case was then appealed to the court of civil appeals, and that court reversed the circuit court. The case was then brought to this court by the writ of *certiorari*.

The defendant is a railroad chartered in Tennessee, and runs from Nashville, in Davidson county, Tennessee, to Chattanooga, in Hamilton county, Tennessee, but for a short distance passes through a part of Alabama, and in so doing through the town of Bridgeport, in that State. The defendant had at the time, and now has, a depot and offices in Chattanooga.

On these facts the question arises which we are to decide.

Howard v. Nashville, C. & St. L. Ry. Co.

In the case of *Joseph Sharp, Adm'r, v. C., N. O. & T. P. Ry. Co.*, 179 S. W., 375 (Knoxville, September term, 1914), in which an opinion was filed at the present term, we had before us the question whether an administrator could be lawfully appointed in this State for a nonresident killed here who left no property except his right of action against the railway company that caused his wrongful death. In the opinion filed it was settled both on reason and authority that such jurisdiction existed. In the case before us the question of jurisdiction is presented on a different state of facts. The intestate was a nonresident, received the injury that caused his death in a foreign State, Alabama, was brought to Hamilton county, Tennessee, soon after the injury, and died within eight hours thereafter. He left no property (as we assume for the purposes of the present discussion), except his right of action against the railway company for causing his wrongful death.

Is there any fundamental difference in the two cases? We think not. Such a right of action is transitory, and may be enforced against the defendant wherever he may be found. This must be understood, of course, with the qualification that such action is not contrary to the policy of the forum, and with the further qualification that the right of action is that allowed by the State wherein the injury occurred, save only such cases as are controlled by the federal Employers' Liability Act or other federal act. Subject to these conditions, such rights of action are permitted

Howard v. Nashville, C. & St. L. Ry. Co.

by comity in nearly all of the States of the Union. The extension of the comity seems to depend on the question whether the same or a substantially similar right of action is recognized by the laws of the forum, subject to the distinction, however, that where the laws of the foreign State are penal in their nature, comity will not be extended to them.

It is generally necessary, as a preliminary to the bringing of such actions, that an administrator be appointed in the State where the suit is to be brought; that is, the statutes creating the liability generally provide for its enforcement by an administrator. At this point the question arises whether it is essential that any property be found in such State, other than the right of action for the wrongful death, as a basis for the appointment of an administrator. In some cases where it is assumed, if not held, that the finding of such other property is essential, it has been held that the finding of an insignificant amount of property would suffice, \$3 or \$4, old clothing, or some other trifle. This fact shows the artificial and highly technical and wholly unsubstantial character of such a rule. And it is unreasonable and unnecessary. As pointed out in *Sharp v. Railway Co.*, supra, and other cases, the right of action itself is property; and it is transitory, and exists wherever the defendant may be found, and an administrator may be there appointed to collect it as in the case of debt. As shown in *Sharp's Case*, it is not material that such right of action is not available for the payment of the debts of the deceased.

Howard v. Nashville, C. & St. L. Ry. Co.

If it be the administrator's duty to sue on the demand, it is not material that the law requires him to pay the amount recovered to the widow and children or next of kin, instead of to creditors. It is just as much his duty to sue in the one case as in the other; and it is just as much the duty of a probate court, county court, or other court having jurisdiction of such matters to appoint an administrator for this purpose or when only this purpose is to be served as it is to appoint when the administrator will have assets of both kinds to deal with—that is, assets for the payment of debts and assets devoted solely to the distributees of the intestate. Any other view must rest on the inherently false basis that the administrator is appointed solely for the benefit of creditors, or to realize assets devoted in whole or in part to them, to the ignoring of those which belong solely to distributees.

Furthermore, such a rule would make it impossible, in very many instances, to enforce the federal Employers' Liability Act. That act can be put in motion only by an administrator. Suits must be brought. There is no provision in the federal laws for the appointment of administrators. These must be appointed by the State tribunals. That act is as much a law of each State as if enacted by the legislatures of all the States, and it is as much the duty of the State courts to enforce it. *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S., 1, 32 Sup. Ct., 169, 56 L. Ed., 327, 38 L. R. A. (N. S.), 44. In the cases to which it applies that law is necessarily supreme, being a law of the federal gov-

Howard v. Nashville, C. & St. L. Ry. Co.

ernment. The right of action so given, being in its nature transitory, must apply to the defendant wherever found in these United States, since it proceeds from supreme power, and is not by its terms limited to any special locality.

Now, let us suppose a case in which it appears a man has been killed under such circumstances as to clothe his widow, and children or next of kin with the right to a recovery under that act, in a suit to be brought by the administrator of the decedent. The decedent left no other property except this right of action. Can any one suppose that a county court or probate court would be permitted to nullify this act of Congress by refusing to appoint an administrator on the ground that the decedent owned no other property except the right of action given him or his estate by the Congress? Take another case. In the same probate court an application for administration is made on the estate of a man who left \$5 and the right of action referred to. Administration is granted on his estate, and denied on the other. Can the courts sanction such discrimination?

Or let us take this Alabama act. It likewise can be made effective only through suit by an administrator. Ought the right of action thereby given, which is equally property, as in the case of the other, and also transitory, and litigable wherever the defendant may be found—ought this right to be destroyed because the decedent was so unfortunate as to own no other property? Will it be said that the right could be enforced

Howard v. Nashville, C. & St. L. Ry. Co.

in Alabama? But the same difficulty would perhaps be found there. Or let us suppose he had been killed in Alabama, not by a railroad company, but by some man of wealth whose home was in Tennessee, and to which State he returned after the homicide. Could the wrongdoer defeat justice through heading off the appointment of an administrator on the ground that the decedent owned no property in Tennessee, except the right of action, and thus permanently prevent the bringing of an action against him?

The foregoing questions, with the inevitable answers they suggest, show the unsoundness of the view that administration can be denied solely because the decedent left no other property than his right of action against the wrongdoer.

And so are the authorities. *Brown v. Railroad Co.*, 97 Ky., 228, 30 S. W., 639; *Findlay v. Railroad Co.*, 106 Mich., 700, 64 N. W., 732; *Hutchins v. Railroad Co.*, 44 Minn., 5, 46 N. W., 79; *Reiter-Connolly Mfg. Co. v. Hamlin*, 144 Ala., 192, 219, 40 South., 280; *Washington Asphalt Block & Tile Co. v. Mackey*, 15 App. D. C., 410; *Western Union Telegraph Co. v. Lipscomb*, 22 App. D. C., 104; *Appeal of Jenkins*, 25 Ind. App., 532, 58 N. E., 560, 81 Am. St. Rep., 114; *Missouri Pac. Railroad Co. v. Bradley*, 51 Neb., 596, 71 N. W., 283; *Boston, etc., R. Co. v. Hurd*, 108 Fed., 116, 47 C. C. A., 615, 56 L. R. A., 193; *Missouri Pac. R. Co. v. Lewis*, 24 Neb., 848, 40 N. W., 401, 2 L. R. A., 67; *Re Mayo*, 60 S. C., 401, 38 S. E., 634, 54 L. R. A., 660; *Jordan v. Chicago, etc., R. Co.*, 125 Wis., 581, 104 N. W., 803, 1

Howard v. Nashville, C. & St. L. Ry. Co.

L. R. A. (N. S.), 885, 890, 110 Am. St. Rep., 865, 4 Ann. Cas., 1113; *Vance v. Southern Ry. Co.*, 138 N. C., 460, 462-464, 50 S. E., 860; *In re Lowham's Estate*, 30 Utah, 436, 85 Pac., 445; *Richards v. Riverside Iron Works*, 56 W. Va., 510, 49 S. E., 437; *Fickeisen v. Wheeling Electrical Co.*, 67 W. Va., 335, 67 S. E., 788, 27 L. R. A. (N. S.), 893, 898; *Fann v. N. C. R. Co.*, 155 N. C., 136, 71 S. E., 81; *Southern Pac. R. Co. v. De Valle Da Costa*, 190 Fed., 689, 111 C. C. A., 417; *Rivera v. Atchison, T. & S. F. Ry. Co.* (Tex. Civ. App.), 149 S. W., 223; *Gulf, C. & S. F. R. Co. v. Beezley* (Tex. Civ. App.), 153 S. W., 651; *Eastern Ry. Co. of New Mexico v. Ellis* (Tex. Civ. App.), 153 S. W., 701. And see *Hartford & N. H. R. Co. v. Andrews*, 36 Conn., 214; *Bruce v. Cincinnati R. Co.*, 83 Ky., 174; *Anderson v. R. Co.*, 210 Fed., 689, 127 C. C. A., 277 (C. C. A. 6th Circuit).

That an action of the kind we have under examination is transitory and may be brought in any jurisdiction, if the statute giving the action is not inconsistent with the statutes or public policy of the forum, is shown not only by our own cases, cited in *Sharp v. Railroad*, *supra*, but the rule is quite general. *Dennick v. Railroad Co.*, 103 U. S., 11, 26 L. Ed., 439; *Stewart v. Baltimore & Ohio R. Co.*, 168 U. S., 445, 18 Sup. Ct., 105, 42 L. Ed., 537. And see the note appended to *Dougherty v. American McKenna Process Co.*, Ann. Cas., 1913D, 570, 571, and the cases there cited.

Howard v. Nashville, C. & St. L. Ry. Co.

In *Pullman Palace Car Co. v. Lawrence*, 74 Miss., 782, 22 South., 53, and *Knight v. West Jersey R. Co.*, 108 Pa., 250, 56 Am. Rep., 200, it was held that the right of action would be entertained where the defendant was found, although both plaintiff and defendant were citizens of the same foreign State. The same rule was announced in *Eingartner v. Illinois Steel Co.*, 94 Wis., 70, 68 N. W., 664, 34 L. R. A., 503, 59 Am. St. Rep., 859. This latter was a case between a citizen of Illinois and a corporation of that State for an injury inflicted in Illinois. In *Nelson, Adm'r, v. Chesapeake & Ohio R. Co.*, 88 Va., 971, 14 S. E., 838, 15 L. R. A., 583, it was held that a recovery, in an action for death, brought by a duly appointed administrator, under an administration proceeding based on a statute of another State, giving a right of action to an administrator, but not providing that such administrator must be appointed in such other State so giving the right of action, will be a complete bar to an action in the latter State for the same wrong.

In the case of *Re Lowham's Estate*, supra, it appeared the death occurred in Wyoming. The administrator was appointed in Utah, and suit brought there; no other asset or property of the estate appearing except the right of action for the wrongful death. In *Fickeisen v. Wheeling Electrical Company*, supra, the facts, so far as they concern the present question, were that the intestate was killed in the city of Bridgeport, in the State of Ohio, by a current of electricity from the wires of the Bridgeport Electrical Company.

Howard v. Nashville, C. & St. L. Ry. Co.

Asserting and believing that the Wheeling Electrical Company, operating in Wheeling, West Virginia, owned and controlled the poles and wires of the Bridgeport Company, the plaintiff applied for administration in Ohio county, in the State of West Virginia, was appointed administrator there, and brought suit there to recover for the wrongful death. The defendant filed a plea contesting the jurisdiction of the county court in West Virginia to appoint an administrator, since the death occurred in the State of Ohio. Responding to this objection, the court said:

“As the defendant company had its habitat in Ohio county (West Virginia), we think the demand against it was property of the estate of the deceased, so as to confer such jurisdiction”—citing *Richards v. Riverside Iron Works*, supra.

In *Southern Pacific Co. v. De Valle Da Costa*, supra, decided by the circuit court of appeals of the first circuit, it appeared that the intestate was at the time of his death a servant of the defendant, a Kentucky corporation; that a statute of that State gave a right of action for wrongful death to be brought by an administrator; that the intestate was killed on the high seas in a vessel belonging to the defendant by negligence of his employer while in the service of the latter. It appeared that administration was taken out in Massachusetts, where the defendant was found; that the estate of the intestate had no other property than the right of action for the wrongful death; that a plea in abatement was filed denying the validity of the grant

Howard v. Nashville, C. & St. L. Ry. Co.

of the letters of administration; that upon the trial of this plea it was stipulated as follows:

“That unless the right of action against the defendant is assets in this jurisdiction, the deceased having no other property here, and not having been at the time of his death a resident of Massachusetts, the plea in abatement is to be sustained; but, if such right of action is assets sufficient to give jurisdiction to the probate court to appoint an administrator here, the plea in abatement is to be overruled; and the case is submitted to the court for a ruling on the matter.”

It was held that the administrator was properly appointed in Massachusetts, and the action rightly instituted there. In the course of the opinion the court said:

“If the statute which gives the right provides for a suit by the personal representative, a question arises whether it is a personal representative appointed by the courts of the State wherein death was caused, a personal representative appointed at the decedent's domicile, or a personal representative appointed in the jurisdiction where the defendant is sued. . . . Though a defendant's liability may be clear, whatever course may be taken in an attempt to enforce this liability, there arise objections supported by good authority which imperil the substantial rights of those for whose benefit the liability was imposed. If administration be taken out in the place of the domicile of the deceased, objection is made that only the State which gives the right of action can appoint a legal rep-

Howard v. Nashville, C. & St. L. Ry. Co.

representative with authority to enforce that right of action. If a legal representative is appointed in such State, it is objected in the State wherein suit is brought that the authority of an administrator has the territorial limits of the State of his appointment. If suit is brought in the State of defendant's residence, a two-fold objection may be made, that the administrator should have been appointed either at the decedent's domicile or in the State whose statute creates the right of action. . . . The right to administration is recognized whenever there are assets within the jurisdiction. Is a death claim assets for the purpose of the appointment of an administrator?

“The enactment of a statute giving an action for death, and requiring that it shall be brought by a personal representative, we think, should be regarded as a conclusive recognition of the right of administration to enforce such a claim. If a statute designates the personal representative of the deceased as the proper plaintiff, to limit the right to cases in which the deceased left assets other than the right of action would introduce an unreasonable and arbitrary distinction. To hold that suit might be brought in the State of Massachusetts for causing death of the deceased if the deceased left property in the State, but that it could not be brought if he had no property, would be to make a distinction in favor of persons who have estates against persons who have no estates—to deny the remedy to those most in need of it. . . .

“We think, further, that either the court of the State wherein the cause of action accrued or the court of the State wherein the defendant resides should recognize the right of action for wrongful death as a sufficient basis for the grant of letters of administration.”

This case was followed in *Rivera v. Atchison, T. & S. F. Ry. Co.*, supra, in which it appeared that the deceased was killed in New Mexico, and in *Gulf, C. & S. F. Ry. Co. v. Beezeley*, supra. In both instances the administrator was appointed in Texas, and the action brought under the federal Employers' Liability Act. The same is true of *Eastern Ry. Co. of New Mexico v. Ellis*, supra.

In *M. P. R. R. Co. v. Lewis*, 24 Neb., 848, 40 N. W., 401, 2 L. R. A., 67, it appeared that the deceased was killed in Kansas, the administrator was appointed in Nebraska, and the suit brought in the latter State under the Kansas statute. It was held that the suit was well brought.

In *Dennick v. Central R. R. Co.*, 103 U. S., 11, 26 L. Ed., 439, the facts were that the decedent was killed in a railway accident in New Jersey, the administrator was appointed in New York, and the action brought in the latter State. The New Jersey statute giving the cause of action provided that actions based on it should be brought by an administrator. It was objected in the case that an administrator could not be appointed in New York and bring suit there. The court held that the right of action was transitory, and the admin-

Howard v. Nashville, C. & St. L. Ry. Co.

istrator might be appointed and the suit brought in any jurisdiction where the defendant might be found.

We are referred to the case of *L. & N. R. R. Co. v. Herb*, 125 Tenn., 408, 143 S. W., 1138, as an authority in opposition to the views herein expressed. As pointed out in *Sharp v. Railroad*, supra, the fundamental misconception in *Railroad v. Herb* was in the view that nothing could authorize the appointment of an administrator in this State except the existence of technical assets, capable of appropriation to the payment of debts, and specifically in holding that the existence of a claim for wrongful death would not alone justify such appointment. It is clear from the discussion in *Sharp v. Railroad*, supra, and from the discussion and authorities in the present case, that we must recede from the views entertained in *Railroad v. Herb* on the point just referred to.

It results that the court of civil appeals committed no error in reversing the trial judge, and in dismissing the proceedings instituted in the county court of Hamilton county to recall the administration previously granted in that court. The judgment of the court of civil appeals will therefore be affirmed.

We observe in the record a motion to compel the plaintiff to elect between the right of action claimed under the federal Employers' Liability Act, and that claimed under the Alabama statute. In what we have said as to the supremacy of the federal law we are not to be understood as expressing an opinion on this subject, as it does not come before us on the present hear-

Howard v. Nashville, C. & St. L. Ry. Co.

ing, and we find authorities on both sides of the question. Cases cited in notes 218 and 219, p. 79, of 47 L. R. A. (N. S.), parts of an extensive note on the federal act, under *Lamphere v. Oregon R. & Nav. Co.*, 47 L. R. A. (N. S.), 48-84.

MR. JUSTICE BUCHANAN dissents.

Jackson et al. v. Thornton et al.

WILLIAM JACKSON, *et al.* v. CAL. THORNTON, *et al.**

(*Knoxville*. September Term, 1915.)

1. **BASTARDS. Evidence. Presumption of legitimacy.**

The presumption of the legitimacy of a child born during wedlock is indulged, though antenuptial conception is made to appear. (*Post*, p. 38.)

Case cited and approved: Cannon v. Cannon, 26 Tenn., 410.

2. **BASTARDS. Evidence. Presumption of legitimacy.**

The presumption of the legitimacy of a child born during wedlock is weakened and may be overcome by a less weight of evidence where antenuptial conception is shown. (*Post*, pp. 38, 39.)

Cases cited and approved: Wilson v. Babb, 18 S. C., 59; Wright v. Hicks, 15 Ga., 171; Dennison v. Page, 29 Pa., 42; McCulloch v. McCulloch, 69 Tex., 682; Wallace v. Wallace, 137 Iowa, 37.

3. **BASTARDS. Evidence. Presumption of legitimacy.**

Though antenuptial conception is shown, clear, strong, and convincing testimony must be adduced to overcome the presumption of the legitimacy of a child born in wedlock, and a mere preponderance is not enough, nor may testimony of mere rumor and suspicion among neighbors touching the paternity of the child overcome the presumption. (*Post*, p. 39.)

Case cited and approved: Scott v. Hillenberg, 85 Va., 245; Bethany Hospital Co. v. Hale, 64 Kan., 367.

FROM JEFFERSON

Appeal from the Chancery Court of Jefferson County.—H. N. CATE, Special Chancellor.

*As to evidence necessary to establish bastardy of child born to married woman see note in 36 L. R. A. (N. S.), 667.

Jackson et al. v. Thornton et al.

WALSH & ELY and J. ARTHUR ATCHLEY, for appellants.

C. T. RANKIN, for appellees.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

Complainants sue to recover land, claiming to be the heirs at law of one Houston Jackson. Defendants claim under a deed executed by Fred Jackson, who, they contend, was the only child and heir of Houston Jackson.

The legitimacy of Fred Jackson is the sole question for determination.

Houston Jackson was a colored man, and intermarried with a young colored girl, Rachael Gentry. Fred Jackson was borne by Rachael after the marriage. This fact is clearly established. The proof tends to show that the child was born three or four months after the marriage, and there is proof indicating that he was begotten by a white man in whose family the mother had worked as a servant girl just before her marriage, and while she was being courted by Houston Jackson.

The proof as to the paternity of the child is so mixed as to make the case turn on the presumption as to legitimacy raised by the law in favor of the legitimacy of one born in wedlock, as we have found that Fred Jackson was.

The earlier rule of the common law was that the presumption of legitimacy growing out of birth during

Jackson et al. v. Thornton et al.

wedlock was so far conclusive as that it could be overcome only by proof of impotence on the part of the husband or his absence from the realm "beyond the four seas") during the period when the child must in the course of nature have been begotten; but the hardship worked by that rule led to its modification by the courts of nearly, if not quite, all jurisdictions, including this court. *Cannon v. Cannon*, 7 Humph. (26 Tenn.), 410.

The authorities differ on the point as to whether if it be made to appear, as here, that conception antedated the nuptials, the presumption is then weakened. All the authorities agree that the presumption of legitimacy continues to be indulged in such case.

Some of the courts hold that the presumption in such case must arise from the fact of the marriage, and not from sexual intercourse assumed to result from the marriage, and that the presumption of legitimate birth is therefore so far weakened as that it may be overcome by a less weight of evidence. *Wilson v. Babb*, 18 S. C., 59; *Wright v. Hicks*, 15 Ga., 171, 60 Am. Dec., 687.

In other cases it is held that antenuptial conception does not weaken the presumption of legitimacy arising from birth after the marriage. *Dennison v. Page*, 29 Pa., 42, 79 Am. Dec., 644; *McCulloch v. McCulloch*, 69 Tex., 682, 7 S. W., 593, 5 Am. St. Rep., 96; *Wallace v. Wallace*, 137 Iowa, 37, 114 N. W., 527, 14 L. R. A. (N. S.), 544, 126 Am. St. Rep., 253, 15 Ann. Cas., 761.

Jackson et al. v. Thornton et al.

We think the better rule is that laid down in the first line of cases.

But, even so, we hold that, in respect of the weight of the evidence required to override the presumption, clear, strong, and convincing testimony must be adduced by him who alleges illegitimacy. A mere preponderance in his favor is not enough; nor may testimony of mere rumor and suspicion among neighbors touching the true paternity of the child avail to overcome the presumption. *Scott v. Hillenberg*, 85 Va., 245, 7 S. E., 377; *Bethany Hospital Co. v. Hale*, 64 Kan., 367, 67 Pac., 848; 8 Enc. Ev., 171.

The proof introduced by complainant is largely of that character. The chancellor properly held it not sufficient to the award of relief to complainants. Affirmed.

Bivens v. State.

BERT BIVENS v. THE STATE.

(Knoxville. September Term, 1915.)

FISH. Preservation. Statutes. Implied repeal.

Acts 1897, ch. 57, made it unlawful to explode dynamite in any stream, lake, or pond, and made any violation a felony. Acts 1907, ch. 489, made it unlawful to kill or wound by the use of dynamite any fish in any stream, lake, river, or pond, and made any violation a misdemeanor. Defendant was convicted under a presentment under the 1897 statute. *Held*, that the 1897 act was impliedly repealed by that of 1907, so that no conviction under it could be sustained.

Acts cited and construed: Acts 1897, ch. 57; Acts 1907, ch. 489.

FROM MONROE.

Appeal from the Circuit Court of Monroe County.
—S. E. BROWN, Judge.

J. D. PENLAND and E. E. IVENS, for appellant.

WM. H. SWIGGART, JR., Assistant Attorney-General,
for the State.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The plaintiff in error was tried and convicted under a presentment for dynamiting a stream inhabited by fish, which presentment was under and closely followed the language of Act 1897, ch. 57, which provided that it shall be unlawful for any person to use, procure, cause or assist in procuring the explosion of any dyna-

Bivens v. State.

mite or any other explosive material whatever in any stream, lake or pond in this State.

The second section of that act made its violation a felony punishable by imprisonment in the penitentiary for not less than one year, or more than three years.

The jury found the accused guilty, but his punishment was in the judgment fixed to be a fine of \$200, and imprisonment in jail for six months. This punishment was evidently meant to be that provided for by a later act now to be outlined.

The general assembly, by Act 1907, ch. 489, p. 1649, enacted a comprehensive statute for the protection and preservation of fish in this State, section 2 of which, in substance, provided: That it shall be unlawful for any person to kill or wound any fish in any of the streams, lakes, rivers or ponds in this State by dynamite, giant powder, etc.; and declaring a violation to be a misdemeanor, and, providing that upon conviction, a fine of \$200 and imprisonment of not less than six months nor more than one year should be the punishment.

In this court, the able assistant attorney-general insists that, while this judgment, as to the punishment, was erroneous, it may and should be corrected in this court by the entry of a judgment here calling for the punishment fixed by the act of 1897—imprisonment for not less than one year in the penitentiary.

This is resisted by counsel for plaintiff in error, who insist that their client was presented for a violation of the earlier act, specifically, and not for killing or

Bivens v. State.

wounding fish, that the act of 1907 operated to repeal that act by implication, and that the presentment cannot be referred to the later act. Therefore, it is urged, no conviction of the accused can be upheld.

It does appear that the act of 1897 made the use by explosion of dynamite in any stream of water a felony, while the statute passed ten years later made the killing or wounding of any fish by the use of dynamite a misdemeanor. May both acts stand, or was the earlier impliedly repealed by the later act?

As noted, the act of 1907 prescribed a comprehensive system for the protection of fish, inclusive of the protection thereof from being killed by dynamite. If both acts stand, we have the anomalous condition that for the explosion of dynamite that does not effect the death or wounding of fish a punishment for a felony is prescribed, whereas for a consummation of such attempt by an actual killing or wounding of fish a punishment for a misdemeanor is stipulated. We cannot impute such a result as one purposed by the legislature. Rather does it seem that by the later act, outlining a general and amplified system, the entire subject was intended to be covered, with result that the earlier statute was repealed by implication. We so hold.

The presentment not being under the act of 1907, or for the killing or wounding of fish, the result is that a conviction cannot be sustained by us. The presentment charged nothing denounced as an offense by any existing statute.

Reversed.

Standard Knitting Mills v. Hickman.

STANDARD KNITTING MILLS v. JESSIE HICKMAN.*

(Knoxville. September Term, 1915.)

1. MASTER AND SERVANT. Liability for injuries. Failure to warrant.

An employee, working on a mangle, as she stepped down from the platform on which she worked to go back of the machine, slipped on a place where a scrubwoman had just put soapy water. Though she had worked on the mangle only a few hours, it, and the floor about it, were in view of her accustomed working place, and she knew that the scrubwoman mopped the floor about twice a week, and knew, also the route taken by the scrubwoman as she passed the mangle. Her attention had been directed to the machine, which was so hot that it would burn one's hand, but on leaving the machine she had nothing to do but keep away from the machine. *Held*, that the danger of slipping was so simple and obvious that it was not incumbent on the employer to warn her of the danger, and it was immaterial that she had been absorbed in her work, as she was relieved of this tension when she stepped down and away. (*Post*, pp. 44-49.)

Cases cited and approved: *Brewer v. Tennessee Coal, etc., Co.*, 97 Tenn., 615; *Cudahy Packing Co. v. Marcan*, 106 Fed., 645; *Omaha Packing Co. v. Sanduski*, 155 Fed., 897; *Kline v. Abraham*, 178 N. Y., 377; *Kleinst v. Kunhardt*, 160 Mass., 230; *Murphy v. American Rubber Co.*, 159 Mass., 266.

Cases cited and distinguished: *Ferguson v. Phoenix Cotton Mills*, 106 Tenn., 236; *Thompson v. Norman Paper Co.*, 169 Mass., 416; *Goudie v. Foster*, 202 Mass., 226; *Hattaway v. Atlanta Steel, etc., Co.*, 155 Ind., 507.

2. MASTER AND SERVANT. Liability for injuries. Unsafe "place" to work.

The word "place," within the rule requiring an employer to furnish a safe place of work, means the premises, or some

*As to servant's assumption of risk from changing conditions of working place during progress of work including obvious risks see notes in 19 L. R. A. (N. S.), 340, 28 L. R. A. (N. S.), 1267.

Standard Knitting Mills v. Hickman.

part of the premises, where the work is done, and does not comprehend mere negligent acts of fellow servants rendering the place dangerous for the time being, as by way of some transient peril. (*Post*, pp. 49, 50.)

Cases cited and approved: *Southern Indiana R. Co. v. Harrell*, 161 Ind., 689; *Herman v. Port Blakely Mill Co.* (D. C.), 71 Fed., 853; *Haskell, etc., Co. v. Przewdziankowski*, 170 Ind., 1.

FROM KNOX

Appeal from the Circuit Court of Knox County.—
VON A. HUFFAKER, Judge.

MAYNARD & LEE and JOUROLMON & WELCHER, for appellant.

HARRIS & BEELER, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

Jessie Hickman, a young woman aged eighteen years, was engaged in running a mangle or ironing machine in the mill of plaintiff in error, at the time she was injured. Her duties were to put unfinished underwear between heated rollers in the machine, and after a dozen garments were so placed, her duty was to go behind the machine, collect the ironed garments that had passed through, and place them where they were to be further worked on by other employees.

While engaged in feeding the garments in the machine, she stood fronting the machine on a platform,

Standard Knitting Mills v. Hickman.

which was about four or five inches above the floor level, from which she stepped to the floor in going to the rear of the machine.

The usual place of work of the employee had been at a table, folding the finished garments for boxing, but in the same room where the mangle stood. She had been changed to the mangle at the commencement of work at seven o'clock in the morning, before the injury at twelve forty-five in the afternoon. She had had no previous experience at the mangle, save a few minutes on two previous occasions. The mangle and the floor about it were, however, in view of her accustomed working place.

About twice a week a scrubwoman customarily mopped the floor of the room to remove oil and dirt; that she did so was known to the plaintiff employee, who knew also the route taken by the scrubwoman as she passed the mangle.

The plaintiff, after putting through the machine a dozen garments just after the noon hour, stepped down from the platform to go back of the machine, when she slipped on the floor at a place where the scrubwoman had just put soapy water, and received the injuries for which this suit was brought.

She testifies that no one had warned her, and that she did not look to see, nor did she know, that the water was standing where she stepped; that while the floor was being mopped by the scrubwoman plaintiff had her attention directed to the machine, which was so hot that it would burn one's hand if touched

Standard Knitting Mills v. Hickman.

against its metal rollers. When she got off of the platform she "had nothing to do but to keep away from the machine, and was not bothered for lack of light."

The rear of the machine could have been reached by going from plaintiff's standing place around the other end where the floor is not shown to have been wet at the time, though the usual route was the one taken by plaintiff. The scrubwoman was yet at work near the machine when plaintiff fell and while not right at the spot, she was at plaintiff's side at that end of the mangle; she had not gone away and left the soapy water on the floor.

The theory of plaintiff for a recovery is that the place of work was unexpectedly made dangerous, and that she, without experience at that place of work, was given no warning of the dangerous situation.

The court of civil appeals sustained this theory. We are asked to review its judgment and to rule that the facts made a case for a directed verdict of nonliability on the part of the employer.

In our opinion the trial judge and that court should have sustained the motion for such peremptory instructions, on the ground that the danger was so simple and obvious as that the employee could, at a glance, observe and comprehend for herself, and so obvious as that it was not incumbent on the employer to give her warning. Plaintiff knew that the floors were cleaned by mopping them with soapy water at intervals, and also the direction the colored woman took, in doing so, as the latter passed the machine in question.

Standard Knitting Mills v. Hickman.

In the case of *Ferguson v. Phoenix Cotton Mills*, 106 Tenn., 236, 61 S. W., 53, the plaintiff employee complained of an injury caused by a hole in the floor at his working place, where he had been employed only five days. The court held that any such danger was obvious; and, denying the right to recover, said:

“It was not incumbent on the defendant to prove that the plaintiff had knowledge of a defect which was plain and obvious. . . . It does not require experience to see a hole in the floor, and as these were necessary for the drainage of the floor, it was one of the risks . . . assumed, and was so simple and obvious that experience was not an element to be considered in determining the question of liability, nor was it such as was incumbent on the defendant to instruct about.”

See, also, *Brewer v. Tennessee Coal, etc., Co.*, 97 Tenn., 615, 37 S. W., 549; 3 Labatt, Master & Servant (2 Ed.), secs. 1000, 1144, citing *Ferguson v. Phoenix Cotton Mills*, supra; *Cudahy Packing Co. v. Marcan*, 106 Fed., 645, 45 C. C. A., 515, 54 L. R. A., 258; *Omaha Packing Co. v. Sanduski*, 155 Fed., 897, 84 C. C. A., 89, 19 L. R. A. (N. S.), 355; *Kline v. Abraham*, 178 N. Y., 377, 70 N. E., 923.

In *Thompson v. Norman Paper Co.*, 169 Mass., 416, 48 N. E., 757, it appeared that a beam on which the plaintiff employee slipped and fell was wet, and had been made more slippery by the placing thereon of soda ash, which was used for cleaning purposes. The common use of soda ash in the mill was known to the employee, but according to his testimony he did not

Standard Knitting Mills v. Hickman.

know it had been used in the particular place. The negligence averred was in the failure to warn the plaintiff that the soda ash had been so used. The court held that the case should have been taken from the jury, saying:

“Plainly it would have been unreasonable to require his employers to have some one at hand to notify him that the beam was wet, and that soda ash had been used. . . . The superintendent was warranted in assuming that the plaintiff would use his eyes, and in supposing that he would know that soda ash might have been employed.”

See, also, *Kleinst v. Kunhardt*, 160 Mass., 230, 35 N. E., 458.

In accord with the above is the case of *Goudie v. Foster*, 202 Mass., 226, 88 N. E., 663, applying the rule to a laundry floor made slippery by an accumulation of starch saturated with water. The plaintiff was held to have assumed the risk of a slippery floor.

In *Hattaway v. Atlanta Steel, etc., Co.*, 155 Ind., 507, 58 N. E., 718, a floor was made slippery by oil being spilled thereon, over which sawdust was thrown to absorb the oil, and the plaintiff knew of the practice. Plaintiff was injured by slipping thereon while using the floor in the prosecution of his work; but the court held the employer not liable, on the ground that the condition was fully exposed to view and the risk an obvious one.

The plaintiff's attitude for a recovery is not changed by reason of any absorption in or a diverting of her

Standard Knitting Mills v. Hickman.

attention to any dangers about her. The danger was that of having a hand burned by or caught between the rollers of the mangle, and that absorbed the plaintiff only while she stood placing the garments between the rollers. She was relieved of tension when she stepped down and away. As plaintiff herself phrased it: "I had nothing to do but to keep away from the machine." She was just leaving the place that was ordinarily dangerous, and she was not injured by the rolls of the mangle.

Moreover, it would seem that if such were not the normal (or, to reverse the phrase, not the fairly fixed abnormal) condition of the floor, but that the slipperiness was caused by the neglect of the scrubwoman, this was the fault of a fellow servant, and the plaintiff cannot recover. *Murphy v. American Rubber Co.*, 159 Mass., 266, 34 N. E., 268; *Omaha Packing Co. v. Sanduski*, supra.

The defect was no more a structural one than would have been a negligent leaving on the floor of her mop by the scrubwoman. The theory of plaintiff is based upon a misconception or confusion of terms. The word "place," within the meaning of the rule that requires an employer to furnish a safe place of work, means the premises, or some part of the premises, where the work is done, and does not comprehend mere negligent acts of the fellow servants that render the place dangerous for the time being, as, for example, by way of some transient peril. *Southern Indiana R. Co. v. Harrell*, 161 Ind., 689, 68 N. E., 262, 63 L. R. A., 460; *Her-*

Standard Knitting Mills v. Hickman.

man v. Port Blakely Mill Co. (D. C.), 71 Fed., 853; *Haskell, etc., Co. v. Przewdziankowski*, 170 Ind., 1, 83 N. E., 626, 14 L. R. A. (N. S.), 972, 127 Am. St. Rep., 352; 3 Words and Phrases, Second Series, 1038.

For failure to sustain the motion for peremptory instructions interposed by the defendant, the judgment of the court of civil appeals is reversed. Judgment here sustaining that motion.

Long v. Mickler.

MRS. EMMA LONG v. MRS. MARGARET MICKLER.

(*Knoxville*. September Term, 1915.)

1. WILLS. Requisites. Execution. Witnesses.

Where the testator wrote out his will, signed it, and on his request procured the signature of one witness without disclosing that it was a will, and that of another witness after disclosing it to be his will, it is valid, under Shannon's Code, sec. 3895, providing that no will shall be good unless written in the testator's lifetime and signed by him and subscribed in his presence by two witnesses, although neither witness saw him sign or subscribed as witness in the presence of the other witness. (*Post*, pp. 53-55.)

Cases cited and approved: *White v. British Museum*, 6 Bing., 310; *Ellis v. Smith*, 1 Ves. Jr., 11; *Wright v. Wright*, 7 Bing., 457.

Cases cited and distinguished: *Simmons v. Leonard*, 91 Tenn., 183; *Osborn v. Cook*, 11 Cush. (Mass.), 532.

Code cited and construed: Sec. 3895 (S.).

2. WILLS. Execution. Witnesses.

Unless publication of the contents of a will to the subscribing witnesses is required by statute, they need not be informed of the character of the document when they subscribe. (*Post*, pp. 55, 56.)

Cases cited and approved: *In re Claffin's Will*, 75 Vt., 19; *Scott v. Hawk*, 107 Iowa, 723; *Watson v. Pipes*, 32 Miss., 451.

FROM HAMILTON

Appeal from the Circuit Court of Hamilton County.
—NATHAN L. BACHMAN, Judge.

Long v. Mickler.

W. B. MILLER, for appellant.

SIZER, CHAMBLISS & CHAMBLISS, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

This case presents a contest of the validity of the will of R. N. Phillips, deceased. The question submitted is whether it was necessary for the testator to have made known to the subscribing witnesses the nature of the document.

The proof showed that R. N. Phillips lived in Chattanooga at the Mountain City Club. He had been ill and confined to his room for several days, and upon his recovery executed the will in controversy here. He wrote the will himself on the stationery of the club, and signed it. After signing it he took the paper to L. W. Llewellyn, exhibited it, and asked Mr. Llewellyn to witness his signature. The paper was so held or folded by Phillips that no part of its contents could be seen or its character ascertained by Llewellyn. Llewellyn demurred to signing the instrument on the ground that he did not like to sign anything without knowing what it was. Phillips replied, "Well, you know that is my signature," and thereupon Llewellyn signed the instrument at the request and in the presence of Phillips as a witness. Phillips then took the paper to W. W. Spotts and requested Spotts to sign it, telling him that it was his (Phillips') will. Spotts thereupon signed the paper as a witness, in Phillips'

Long v. Mickler.

presence. About a week later Phillips told Llewellyn, the first witness, that the paper the latter had subscribed was his (Phillips') will.

Upon the foregoing testimony being offered, the trial judge directed a verdict in favor of the will, there being no question made upon its validity except the failure of the testator to make publication of its contents to the subscribing witnesses. The court of civil appeals affirmed the judgment below, and we think the action of the two courts was proper.

It was not necessary that either of the witnesses should have seen the testator sign the paper, nor that either should have subscribed it in the presence of the other witness. *Simmons v. Leonard*, 91 Tenn., 183, 18 S. W., 280, 30 Am. St. Rep., 875, and cases cited.

The statute of Tennessee is as follows:

“No last will or testament shall be good or sufficient to convey or give an estate in lands, unless written in the testator's lifetime, and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, neither of whom is interested in the devise of said lands.” Shannon's Code, sec. 3895.

This statute is founded on the section of the statute of frauds relating to wills (29 Car. II, ch. 3), which provides that a devise of lands shall be attested and subscribed in the presence of the testator by three or four credible witnesses.

The English courts have always held, construing the statute, that the witnesses need not know the in-

Long v. Mickler.

strument they were attesting was a will. They said the question was whether there was an acknowledgment in fact by the testator to the subscribing witnesses, though there was none in words, that the instrument was his will; for if, by what the testator did he must in common understanding and reasonable construction be taken to have acknowledged the instrument to be his will, the attestation thereof would be considered as complete. *White v. British Museum*, 6 Bing., 310; *Ellis v. Smith*, 1 Ves. Jr., 11; *Wright v. Wright*, 7 Bing., 457.

In his work on wills, Mr. Underhill points out that in some of the States of the American Union the English statute referred to has been re-enacted with the additional requirement that the testator must declare the instrument to be his will in the presence of the attesting witnesses. But he states that in those jurisdictions where the English statute of frauds has been re-enacted without the additional requirement for publication the witnesses need not know the instrument which they attest is a will.

“For,” he says, “the law requires a subscription by witnesses only in order that the paper which is offered for probate as a will may be then identified as the same instrument which was executed by the testator in the presence of the witnesses.” Underhill on Wills, sec. 180, and section 202.

The supreme court of Massachusetts has said:

“This will was in writing, signed by the testator, and attested and subscribed in his presence by three

Long v. Mickler.

competent witnesses. It was written by the testator. He knew, therefore, if of sound mind, what he signed, and what he asked the witnesses to attest. The calling upon witnesses to attest his execution of an instrument, whose character and contents he well knew, was in effect a declaration that the instrument he had signed, and his signature to which he desired them to attest, was his act, though the character and contents of the instrument were not disclosed to them. It was as if the testator had said: 'This instrument is my act; it expresses my wishes and purposes; and, though I do not tell you what it is, I desire you to attest that it is my act, and that I have executed and recognized it as such in your presence.' We think all the requirements of the statute are met and satisfied. No formal publication of the instrument, no declaration of its contents, or of its nature, is in terms required. The legislatures have prescribed certain solemnities, to be observed in the execution of a will, that it may be seen that it is the free, conscious, intelligent act of the maker; but they have not prescribed that he should publish to the world or to the witnesses, what is in the will, or even that it is a will." *Osborn v. Cook*, 11 Cush. (Mass.), 532, 59 Am. Dec., 155.

The law seems to be well settled that unless publication of the contents of the will to the subscribing witnesses is required by statute, it is unnecessary, and such witnesses need not be informed of the character of the document at the time they subscribe their names as witnesses. See *In re Clafin's Will*, 75 Vt., 19, 52

Long v. Mickler.

Atl., 1053, 58 L. R. A., 261; *Scott v. Hawk*, 107 Iowa, 723, 77 N. W., 467, 70 Am. St. Rep., 228; *Watson v. Pipes*, 32 Miss., 451. See, also, 40 Cyc., 1116, 1117, and cases cited.

The judgment of the court of civil appeals will be affirmed.

Lillienkamp v. Rippetoe.

SARAH A. LILLIENKAMP *v.* W. T. RIPPETOE.**(Knoxville. September Term, 1915.)***HUSBAND AND WIFE. Actions for torts. Statutory provisions.**

Neither Shannon's Code, sec. 6470, making one committing an assault and battery upon his wife for any cause whatsoever guilty of a misdemeanor, nor Pub. Acts 1913, ch. 26, providing that married women are thereby fully emancipated from all disability on account of coverture, that marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married, but that every married woman shall have the same capacity to acquire, hold, control, and dispose of property and to make any contract in reference thereto and to bind herself personally, and to sue and be sued as if she were not married, abrogates the common-law rule that one spouse cannot sue the other for a tort committed during the marriage, as it must be assumed that, if it had been the purpose of the legislature to change this rule, such purpose would have been clearly expressed, or would have appeared by necessary implication.

Acts cited and construed: Acts 1913, ch. 26.

Cases cited and approved: McKelvey v. McKelvey, 111 Tenn., 388; Abbott v. Abbott, 67 Me., 304; Thompson v. Thompson, 218 U. S., 611; Strom v. Strom, 98 Minn., 427; Freethy v. Freethy, 42 Barb. (N. Y.), 641; Schultz v. Christopher, 65 Wash., 496; Schultz v. Schultz, 89 N. Y., 644; Peters v. Peters, 156 Cal., 32; Bandfield v. Bandfield, 117 Mich., 80; Libby v. Berry, 74 Me., 286; Phillips v. Barnett, 1 Q. B. D., 436; Queen v. Dayton Coal & Iron Co., 95 Tenn., 458; Adams v. Insurance Co., 117 Tenn., 470; Weeks v. McNulty, 101 Tenn., 495; Railway v. Haynes, 112 Tenn., 712.

*As to right of wife to sue husband for personal tort, see notes in 6 L. R. A. (N. S.), 191, 30 L. R. A. (N. S.), 1153. 52 L. R. A. (N. S.), 185.

Lillienkamp v. Rippetoe.

Cases cited and distinguished: Parlow v. Turner, 132 Tenn., 339; State v. Cooper, 120 Tenn., 549.

Codes cited and construed: Sec. 6470 (S. 1896).

Constitution cited and construed: Art. 2, sec. 17.

FROM KNOX

Appeal from the Circuit Court of Knox County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
VON. A. HUFFAKER, Judge.

GREEN, WEBB & TATE and McCANDLESS, COLEMAN & TAYLOR, for plaintiff.

W. N. HICKEY, for defendant.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

The only question necessary to be decided is whether a divorced woman can maintain against her former husband an action for damages resulting from an assault and battery committed by him upon her person after the passage of chapter 26 of the Acts of 1913, and while they sustained toward each other the relation of husband and wife; the action having been instituted after the divorce, and within one year after the date of the battery.

The case is before us on plaintiff's petition for *certiorari*, seeking to reverse the judgment of the court of civil appeals, which affirmed the judgment of the circuit court by which plaintiff's suit was dismissed at the point of a demurrer interposed by defendant.

Lillienkamp v. Rippetoe.

Beyond all question, under the common law as it was in force in this State prior to the passage of the act of 1913, *supra*, such an action as this could not have been maintained. It was a fundamental principle of the common law that by marriage husband and wife became one. Her existence as a legal unit became merged into that of the husband, and during the continuance of the coverture she was capable of suing or defending an action only with his concurrence, and in his name as well as her own. It has been held in this State that neither spouse could maintain an action against the other for torts committed by one against the other during coverture. The holding was said to rest in part upon their unity by virtue of the marriage, which was said to preclude one from suing the other at law, and in part it was said to rest upon the respective rights and duties involved in the marriage relation. *McKelvey v. McKelvey*, 111 Tenn. (3 Cates), 388, 77 S. W., 664, 64 L. R. A., 991, 102 Am. St. Rep., 787, 1 Ann. Cas., 130. This holding is supported by a practically unanimous current of authority. *Abbott v. Abbott*, 67 Me., 304, 24 Am. Rep., 27; Schouler's Domestic Relations, sec. 52 (4th Ed.); Cooley on Torts (2 Ed.), secs. 223-233; 21 Cyc., 1519, 1520; *Thompson v. Thompson*, 218 U. S., 611, 31 Sup. Ct., 111, 54 L. Ed., 1180, 30 L. R. A. (N. S.), 1153, 21 Ann. Cas., 921; *Strom v. Strom*, 98 Minn., 427, 107 N. W., 1047, 6 L. R. A. (N. S.), 191, 116 Am. St. Rep., 387, and note; *Freethy v. Freethy*, 42 Barb. (N. Y.), 641; *Schultz v. Christopher*, 65 Wash., 496, 118 Pac., 629, 38 L. R. A. (N. S.), 780; *Schultz v. Schultz*, 89 N. Y., 644; *Peters v.*

Lillienkamp v. Rippetoe.

Peters, 156 Cal., 32, 103 Pac., 219, 23 L. R. A. (N. S.), 699; *Bandfield v. Bandfield*, 117 Mich., 80, 75 N. W., 287, 40 L. R. A., 757, 72 Am. St. Rep., 550; *Libby v. Berry*, 74 Me., 286, 43 Am. Rep., 589; *Phillips v. Barnett*, 1 Q. B. D., 436 (English).

In some of the cases cited above the insistence was made that, the marriage relation having been terminated by the divorce, the right of action revived, having been merely suspended during coverture; but in reply it was said:

“That the error in this insistence was in supposing that a right of action ever existed; that there was no civil remedy either during or after coverture, because there was no civil right to be redressed.” *Phillips v. Barnett* and *Abbott v. Abbott*, *supra*.

See, also, *McKelvey v. McKelvey*, *supra*.

We do not understand plaintiff's brief to question the rule of the common law, as above set out. Her insistence is that the rule of the common law was abrogated by the following statutes of this State:

“If any person commits an assault and battery upon his wife, for any cause whatsoever, he is guilty of a misdemeanor, and punishable accordingly.” Shan. Code 1896, sec. 6470.

Chapter 26 of the Public Acts of the year 1913:

“A bill for an act to be entitled ‘An act to remove disabilities of coverture from married women, and to repeal all acts and parts of acts in conflict with the provisions of this act.’

“Section 1. Be it enacted by the general assembly of the State of Tennessee, that married women be, and

Lillienkamp v. Rippetoe.

are, hereby fully emancipated from all disability on account of coverture, and the common law as to the disabilities of married women and its effects on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of, all property, real and personal, in possession, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued with all the rights and incidents thereof, as if she were not married.

“Sec. 2. Be it further enacted, that all acts and parts of acts in conflict with the provisions of this act be, and the same are, hereby repealed.

“Sec. 3. Be it further enacted, that this act take effect from and after January 1, 1914, the public welfare requiring it.

“Passed February 20, 1913.”

The constitutionality of the act of 1913 was assailed in *Parlow v. Turner*, 178 S. W., 766, and on that point this court, speaking through its chief justice, said:

“It is said that the act is unconstitutional because it violates so much of article 2, sec. 17, of the constitution as provides that no bill shall become a law which embraces more than one subject, that subject to be ex-

Lillienkamp v. Rippetoe.

pressed in the title. There is but a single subject, and that appears fully in the title, viz., the relief of married women from the disabilities of coverture. That subject fully covers every element that is written into the body of the act. The first clause, standing alone, 'that married women be, and are, hereby fully emancipated from all disability on account of coverture,' would have made thoroughly effective the purpose expressed in the title. All that followed merely amplified the thought, but each term of particularization lay implicit within the clause quoted."

The Act does not purport by any express provision to abrogate that fundamental principle of the common law, under which, by virtue of the marriage, husband and wife became a legal unit during the existence of coverture; nor does it purport to absolve the wife from the duties to the husband which the common law, by reason of their relationship, imposed upon her; nor does it purport to deprive her of the benefits, protection and support, which her husband was at common law held bound to afford her. It does not in express terms confer upon her the right to sue her husband for torts committed upon her during coverture, nor does it purport by such terms to confer upon him the right to sue her for such torts committed by her. By no express terms of this Act are the respective rights and duties of the husband and wife toward each other involved in the marriage relation disturbed or affected, except as such a result must necessarily flow from the exercise by her of the powers and capacities in respect of her property rights in the Act set out.

Lillienkamp v. Rippetoe.

It is clear that section 6470, Shannon's Code 1896, quoted supra, does not accomplish any abrogation of the common-law rule in respect of actions for tort by either spouse against the other. That section merely denounces any person who commits an assault and battery upon his wife, for any cause whatsoever, as guilty of a misdemeanor, and punishable accordingly. In connection with the statute last referred to, and chapter 26 of the Acts of 1913, plaintiff's brief relies upon the following of our cases: *Queen v. Dayton Coal & Iron Co.*, 95 Tenn. (11 Pick.), 458, 32 S. W., 460, 30 L. R. A., 82, 49 Am. St. Rep., 935; *Adams v. Insurance Co.*, 117 Tenn. (9 Cates), 470, 101 S. W., 428; *Weeks v. McNulty*, 101 Tenn. (17 Pick.), 495, 48 S. W., 809, 43 L. R. A., 185, 70 Am. St. Rep., 693; *Railway v. Haynes*, 112 Tenn. (4 Cates), 712, 81 S. W., 374. But we do not understand the brief to insist that section 6470, Shannon's Code, and the principles on which he relies as established by the cases last cited, would avail to change the common-law doctrine that one spouse cannot maintain suit against the other for a tort committed during the existence of the marriage relation. At all events, in our opinion, there would be no merit in such an insistence, if made.

Examination of the cases cited to sustain the existence of the common-law rule first laid down herein will disclose a practically unanimous concurrence of judicial opinion to the effect that an abrogation of the common-law rule will only be held to have been accomplished by a statute when such purpose is clearly expressed therein.

Lillienkamp v. Rippetoe.

It has been held in this State:

“That a statute will not be construed to alter the common law, further than the act expressly declares or than is necessarily implied from the fact that it covers the whole subject-matter.” *State v. Cooper*, 120 Tenn. (12 Cates), 549, 113 S. W., 1048, 15 Ann. Cas., 1116.

We must assume that the legislature had in mind in the passage of the act the fundamental doctrine of the unity of husband and wife under the common law, and the correlative duties of husband and wife to each other, and to the well-being of the social order growing out of the marriage relation, and that, if it had been the purpose of the legislature to alter these further than as indicated in the act, that purpose would have been clearly expressed.

We are not warranted in ascribing to the legislature by anything appearing in this act a purpose to empower a wife to bring an action against her husband for injuries to her person occurring during the coverture, thereby making public scandal of family discord, to the hurt of the reputation of husband and wife, their families and connections, unless such purpose clearly appears by the express terms of the act. It results that, in our opinion, there is no error in the judgment of the court of civil appeals, and the same is therefore affirmed.

Bennett v. Hutchens.

J. C. BENNETT *et al.* v. JEFFERSON HUTCHENS *et al.*

(*Knoxville*. September Term, 1915.)

1. HUSBAND AND WIFE. After acquired property. Estates by the entirety.

Where a deed of land is to a husband and wife, an estate therein is by the entirety, and not in common, so that, on the death of one, the other takes the land absolutely. (*Post*, pp. 68, 69.)

2. HUSBAND AND WIFE. Estates by the entirety. Deed. Construction.

Where a deed of land is to a husband and wife, it is immaterial that it does not show upon its face that they are husband and wife, or that it was the intention of the grantor to create an estate by the entirety, but the common-law requires that the estate be by the entirety. (*Post*, pp. 69-71.)

Cases cited and approved: *Taul v. Campbell*, 15 Tenn., 319; *Ames v. Norman*, 36 Tenn., 683; *Johnson v. Lusk*, 46 Tenn., 114; *Berrigan v. Fleming*, 70 Tenn., 271; *Shields v. Netherland*, 73 Tenn., 193; *McRoberts v. Copeland*, 85 Tenn., 211; *Jackson, Orr & Co. v. Shelton*, 89 Tenn., 82; *Hopson v. Fowlkes*, 92 Tenn., 697; *Chambers v. Chambers*, 92 Tenn., 707; *Walker v. Bobbitt*, 114 Tenn., 700; *Beddingfield v. Estill & Newman*, 118 Tenn., 39; *Hiles v. Fisher*, 144 N. Y., 306; *Jordan v. Reynolds*, 105 Md., 288; *Pegg v. Pegg*, 165 Mich., 228; *In re Meyer*, 232 Pa., 89; *Wilson v. Frost*, 186 Mo., 311.

Case cited and distinguished: *Cole Mfg. Co. v. Collier*, 95 Tenn., 116.

3. HUSBAND AND WIFE. Estates by the entirety. Statutory provisions.

Shannon's Code, sec. 3677, providing that in all estates held in joint tenancy the share of the joint tenant dying shall descend to his heirs, instead of the other joint tenant, does not abolish
133 Tenn. 5

Bennett v. Hutchens.

estates by the entirety, but is limited to estates held in technical joint tenancy. (*Post*, pp. 71, 72.)

Acts cited and construed: Acts 1784, ch. 22, sec. 6.

Codes cited and construed: Sec. 2010 (1858); sec. 3677 (S.).

4. HUSBAND AND WIFE. Estates by the entirety. Statute. Construction.

Laws 1913, ch. 26, providing that married women shall be released from all disability on account of coverture, and that the common law limiting their estates is abrogated, giving them all the rights of *feme sole*, does not affect the estates of married women held at the time of its passage, since it does not purport on its face so to do, and a statute will not be construed to alter the common-law further than it expressly declares or necessarily implies a change. (*Post*, pp. 72, 73.)

Acts cited and construed: Acts 1913, ch. 26.

Case cited and approved: *Lillienkamp v. Rippetoe*, 133 Tenn., 57.

Cases cited and distinguished: *State v. Cooper*, 120 Tenn., 549; *Wilson v. Frost*, 186 Mo., 311.

FROM KNOX.

Appeal from the Chancery Court of Knox County.—
WILL D. WRIGHT, Chancellor.

NOBLE SMITHSON, for appellants.

A. C. GRIMM and W. F. BLACK, for appellee.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

The action is ejectment brought by the collateral kindred and heirs at law of Darcus Hutchens. The

Bennett v. Hutchens.

land in suit was conveyed to her and her husband, Jefferson Hutchens, by deed dated September 22, 1897, filed for registration and registered June 24, 1899. The land conveyed by the deed was held by the husband and wife until her death intestate and without issue in September, 1914. It was thereafter held by Jefferson Hutchens until June 22, 1915, when he, by deed, conveyed it to R. L. Peters, his codefendant herein. Hutchens, we assume, was made a defendant in this suit upon the idea that, as the holder of a purchase-money lien, he was a necessary party. The defendants interposed a demurrer to the bill. The chancellor sustained the demurrer, dismissed the bill, and complainants appealed. The theory of the bill is that, upon the death of Mrs. Hutchens, complainants, as her heirs at law, became the owners of an undivided one-half interest in the land; or, in other words, the theory is that, at the time of the death of Mrs. Hutchens, she and her husband were tenants in common, each owing an undivided one-half interest in the property.

The defendants insist that, under the deed to Hutchens and wife, they were seized of an estate by the entirety, and therefore that no estate in the land passed to her heirs at law upon the death of Mrs. Hutchens.

To support complainants' theory, the first insistence advanced is that the deed on its face did not purport, and did not convey, an estate by the entirety to the grantees. So far as the provisions of the deed need be noticed, they were as follows:

Bennett v. Hutchens.

“This indenture; made this 22d day of September, A. D. 1897, between Rufus M. Bennett, of Knox county, in the State of Tennessee, of the first part, and Darcus Hutchens and Jefferson Hutchens, of the same county and State, of the second part, witnesseth.”

Then follows a recital that the parties of the first part, for and in consideration of the sum of \$1 in hand paid by the parties of the second part, the receipt of which is acknowledged, have granted, bargained, sold, and conveyed,

“and doth hereby grant, bargain, sell and convey unto the said parties of the second part the following described premises, to wit.”

Here is recited a description of the land, and then:

“With the hereditaments and appurtenances thereunto appertaining, . . . except the said Darcus Hutchens and Jefferson Hutchens of the second part are to pay an annual rent of the sum of \$25 to the said Rufus M. Bennett as long as he may live.”

Then follow the usual habendum clause and general covenants of warranty, the testimonium clause, the signature of the grantor, signature of a witness, certificates of acknowledgment, etc., all in proper form.

The stipulation for an annual rental was part of the consideration for the deed. The bill avers that the grantees in the deed were husband and wife when it was made.

We think it is clear that this deed vested in Jefferson and Darcus Hutchens an estate by the entirety. Such a deed to persons not husband and wife, considered

Bennett v. Hutchens.

under the common law, would have created in the grantees an estate in joint tenancy. Each of the grantees under such a deed would have taken as individuals, one and the same interest at one and the same time by one and the same deed, and they would have held the estate conveyed by one and the same undivided possession. By the authorities it is held that a deed to husband and wife, which would at common law have created in them an estate in joint tenancy, had they not been married, does, by the fact of the marriage, create in the husband and wife an estate by the entirety. This upon the reasoning that in the eye of the law husband and wife are not separate individuals, but one person, and the estate vests in them as an entirety. In legal contemplation, each of them is seised of the whole estate, and the death of one of them does not put an end to the seisin of the survivor, because his or her original seisin was of the whole, and not of part, of the estate.

It is immaterial that the deed in the present case did not on its face name the grantees as husband and wife; nor is it material that we find in the deed no words used to indicate a purpose in the grantor to create an estate by the entireties; nor a purpose in the grantees that such an estate should be conferred upon them. The estate, by the entireties, upon the execution of the deed, depended on the unity of the husband and wife, under the common law.

“If an estate be given to a man and his wife they are neither properly joint tenants nor tenants in common;

Bennett v. Hutchens.

for husband and wife being considered as one person in law, they cannot take the estate by moieties but both are seized of the entirety, *per tout, et non per my*; the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." 2 Bla. Com., 182.

"The authorities agree that 'the same words of conveyance which would make two other persons joint tenants will make a husband and wife tenants of the entirety, so that neither can sever the jointure, but the whole must accrue to the survivor.' " *Cole Manufacturing Co. v. Collier*, 95 Tenn. (11 Pick.), 116, 117, 31 S. W., 1000, 30 L. R. A., 315, 49 Am. St. Rep., 921.

"The properties of a joint estate are derived from its unity, which is fourfold—the unity of interest, the unity of title, the unity of time, and the unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession." 2 Bla. Com., 180.

Generally, on the same subject, see the following of our cases: *Taul v. Campbell*, 15 Tenn. (7 Yerg.), 319, 27 Am. Dec., 508; *Ames v. Norman*, 36 Tenn. (4 Sneed), 683, 70 Am. Dec., 269; *Johnson v. Lusk*, 46 Tenn. (6 Cold.), 114, 98 Am. Dec., 445; *Berrigan v. Fleming*, 70 Tenn. (2 Lea), 271; *Shields v. Netherland*, 73 Tenn. (5 Lea), 193; *McRoberts v. Copeland*, 85 Tenn. (1 Pick.), 211, 2 S. W. 33; *Jackson, Orr & Co. v. Shelton*,

Bennett v. Hutchens.

89 Tenn. (5 Pick.), 82, 16 S. W., 142, 12 L. R. A., 514; *Hopson v. Fowlkes*, 92 Tenn. (8 Pick.), 697, 23 S. W., 55, 23 L. R. A., 805, 36 Am. St. Rep., 120; *Chambers v. Chambers*, 92 Tenn. (8 Pick.), 707, 23 S. W., 67; *Walker v. Bobbitt*, 114 Tenn. (6 Cates), 700, 88 S. W., 327; *Beddingfield v. Estill & Newman*, 118 Tenn. (10 Cates), 39, 100 S. W., 108, 9 L. R. A. (N. S.), 640, 11 Ann. Cas., 904. For general authority to the same effect, see *Hiles v. Fisher*, 144 N. Y., 306, 39 N. E., 337, 30 L. R. A., 305, and note, 43 Am. St. Rep., 762; *Jordan v. Reynolds*, 105 Md., 288, 66 Atl., 37, 9 L. R. A. (N. S.), 1026, and note, 121 Am. St. Rep., 578, 12 Ann. Cas., 51; *Pegg v. Pegg*, 165 Mich., 228, 130 N. W., 617, 33 L. R. A. (N. S.), 166, and note, Ann. Cas., 1912C, 925; *In re Meyer*, 232 Pa., 89, 81 Atl., 145, 36 L. R. A. (N. S.), 205, and note, Ann. Cas., 1912C, 1240; *Wilson v. Frost*, 186 Mo., 311, 85 S. W., 375, 105 Am. St. Rep., 619, 2 Ann. Cas., 557, and note.

Complainants' second insistence is that estates by the entirety were abolished by our Acts 1784, ch. 22, sec. 6. See section 2010, Code 1858, and section 3677, Shannon's Code, which legislation is as follows:

“In all estates, real and personal, held in joint tenancy, the part or share of any joint tenant dying shall not descend or go to the surviving tenant or tenants, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common.”

Bennett v. Hutchens.

The view now insisted on by complainants as the effect of the above legislation was put forward, but rejected, by our court in *Taul v. Campbell*, supra, and other of our cases heretofore cited. We are urged to overrule those cases, but we decline to do so, both upon the ground that upon them now depend well-settled rules of property, and because in our opinion their reasoning is sound.

The final insistence offered by complainants is that the effect of chapter 26 of the published Acts of 1913 was to abrogate the fundamental principles of the common law under which, by virtue of the marriage, husband and wife became a legal unity, and their argument is that, such being the effect of the act, the result was to destroy all existing estates by entireties, including that held by Hutchens and wife in the land sued for herein. The bill avers that the wife, Mrs. Hutchens, died after the act took effect.

We have had occasion, during the present term, to consider this act in the case of *Sarah Lillienkamp v. W. T. Rippetoe*, 179 S. W., 628, Knox Law, and an opinion for publication was handed down. The conclusion we reached in that case was not in accord with the present insistence of the complainants.

The act does not, by its terms, purport to abrogate estates held by entireties at the time of its passage, and created by contract antedating its passage. If the legislature had intended the act to have such effect, we must assume that it would either in plain terms have so declared, or that it would have employed terms from

Bennett v. Hutchens.

the use of which such effect would necessarily result. In the absence of such declaration or clear implication that the act should have such effect, we are not called upon to express any opinion based on the hypothesis of the presence of such a legislative purpose; nor do we express any opinion as to what the effect of the act would be on the estate conveyed to husband and wife by deed executed after the act became effective. The rule in this State is:

“That a statute will not be construed to alter the common law further than the act expressly declares, or than is necessarily implied from the fact that it covers the whole subject-matter.” *State v. Cooper*, 120 Tenn. (12 Cates), 549, 113 S. W., 1048, 15 Ann. Cas., 1116 and authorities cited; *Sarah Lillienkamp v. W. T. Rippetoe*, supra, and cases cited; *Wilson v. Frost*, 186 Mo., 311, 85 S. W., 375, 105 Am. St. Rep., 619, 2 Ann. Cas., 557, and note.

Examination of the cases cited in the note last above will disclose the weight of authority to be in support of our view of the effect of the act of 1913.

The three questions we have discussed dispose of all of the assignments of error made by complainants, and it results that the decree of the chancellor will be affirmed, at the complainants' cost.

C., N. O. & T. P. Ry. Co. v. Wright.

CINCINNATI, N. O. & T. P. Ry. Co. v. EVA WRIGHT.*

(Knoxville. September Term, 1915.)

1. RAILROADS. Actions for injury or death. Confusing instructions.

In an action for the death of a person struck by a railroad train while standing at a point on a sharp curve, it was the theory of the company sustained by proof that a south-bound train was so interposed between deceased and the engine which struck him that deceased and his companion could not be seen from the engine. Plaintiff requested a charge that, if deceased could have been seen on the track by one on the lookout ahead before the view was cut off by the south-bound train, the law required that he be seen, and, though the south-bound train subsequently cut off the view, it was the duty of those operating the train to reduce the speed and bring the train under such control as to make certain that it could be stopped after he could again be seen and before striking him. The court so charged, with the modification that, if deceased again appeared upon the track, it was the duty of those on the engine not to so control the train as to be certain that it could be stopped before striking deceased, but to sound the alarm, put down the brakes, and use every possible means to stop the train and prevent the accident. *Held*, that this instruction, with the modification, was at least confusing to the jury. (*Post*, pp. 77-79.)

2. RAILROADS. Injuries to persons on track. Keeping "lookout ahead."

Under Shannon's Code, sec. 1574, providing that every railroad company shall keep the engineer, fireman, or some other person upon the locomotive always upon the "lookout ahead," engine-men are not required, when on a curve, to look across the intervening space to the further end of the curve, thereby

*On duty of railroad to maintain lookout for persons on track see notes in 25 L. R. A., 287, 8 L. R. A. (N. S.), 1069, 41 L. R. A. (N. S.), 264.

As to what places and operations statute or ordinance requiring lookout on trains applies. See note in 51 L. R. A. (N. S.), 618.

C., N. O. & T. P. Ry. Co. v. Wright.

withdrawing the lookout from the track immediately ahead of the engine. (*Post*, pp. 79-81.)

Cases cited and approved: *East Tennessee, etc., R. Co. v. St. John*, 37 Tenn., 525; *Patton v. Railway*, 89 Tenn., 370; *Cincinnati, etc., Co. v. Brock*, 132 Tenn., 477; *Central, etc., Co. v. Vaughan*, 93 Ala., 209.

Code cited and construed: Sec. 1574 (S.).

3. RAILROADS. Injuries to persons on track. Rate of speed on curves.

As a precaution against injury to persons walking on the track, but not seen or known so to be, there is no duty to slacken the ordinary speed of a train approaching a curve in the open country, though the curve be in whole or in part in a cut or hidden from view by a train going in the opposite direction on the concave side of the curve. (*Post*, pp. 81, 82.)

Case cited and distinguished: *Hoffard v. Illinois Cent. R. Co.*, 138 Iowa, 543.

FROM SCOTT.

Error to the Criminal and Law Court of Scott County.—XEN. HICKS, Judge.

H. M. CARR, for plaintiff in error.

J. A. FOWLER and R. HURT, for defendant in error.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

In the capacity of widow, and seeking to recover under the statute for the benefit of herself and her minor children, Eva Wright brought this suit against the appellant railway company to recover damages for the alleged negligent killing of her husband. She re-

C., N. O. & T. P. Ry. Co. v. Wright.

covered a judgment for \$1,000, which was sustained by the Court of Civil Appeals.

On August 31, 1913, deceased, Wright, along with one James Thompson, went from their home to a point on the Tennessee-Kentucky State line to lay in a supply of "Labor Day" whisky. On their return, with their whisky in a basket and a bag, they made use of the tracks of appellant railway company as a walkway. The line of railway is double-tracked in that section, and the two men were walking south on the west or south-bound track, when they heard a freight train approaching from the north. They left the west track and went upon the east or north-bound track, and, when the south-bound train was passing them, they turned and faced the passing train and waved at the fireman on the engine of the south-bound train. While standing thus engaged on the north-bound track, a freight train running north ran upon them, instantly killing Wright. Thompson, who was standing within a few feet of Wright, further from the approaching engine, and within striking distance of the same, was struck and injured. He had so far recovered as to be the chief witness in behalf of the widow of Wright in the trial of this case in the court below.

Thompson testified that when his attention was first attracted by the north-bound engine it was about to hit Wright, or was within three or four feet of him. It does not appear whether deceased Wright ever saw this engine; he having been instantly killed by it. It

C., N. O. & T. P. Ry. Co. v. Wright.

is the claim of appellee that the statutory alarm signal was not sounded from the north-bound engine.

The record shows that these men were struck while standing at a point on a sharp curve of about three and one-half to four degrees curvature, and that in this curve was a cut about twelve feet deep.

The lower end of this curve was a considerable distance from the place where these men stood looking at the train passing on the west track, which track is on the concave side of the curve.

It was the theory of the railway company (sustained by proof) that the south-bound train was so interposed between the engine of the north-bound train and these men as that they could not be seen as an obstruction on the track ahead of the engine; that the intervening train on the inside of the curve interfered with the line of vision from the engine to the point where the deceased stood; and further, that it was not the duty of the engineer or fireman to look to or directly in the direction of a point towards the upper end of the curve, if thereby attention was withdrawn from the track more immediately in front of the engine; in other words, that it was no part of their duty to look across the intervening space, when their line of vision would be directed away from the points on the track more immediately ahead of the advancing engine.

The counsel for the plaintiff widow, in an effort to meet this contention, submitted a request for a charge to the jury as follows:

C., N. O. & T. P. Ry. Co. v. Wright.

“If the deceased, Eck Wright, could have been seen as an obstruction upon the north-bound track by one on the lookout ahead, on either the engineer’s or fireman’s side of the engine, before the view was cut off by the south-bound train, then the law required that he be seen by such person on the lookout, and, though the south-bound train subsequently cut off the view of said Wright, yet it was the duty of those operating the north-bound train to reduce speed and bring the train under such control as to make certain that it could be stopped after said Wright could again be seen and before striking him.”

The trial judge responded to this request in the following language:

“I instruct you that this is the law, with this modification, however, that if the deceased again appeared upon the track, it was the duty of the agents and servants of the defendant on the engine not to so control the train as to be certain that it could be stopped before striking Wright, but to sound the alarm, put down the brakes, and use every possible means to stop the train and to prevent the accident.”

The railway company assigned this action of the trial judge as error in the Court of Civil Appeals, but that court failed to see error in the request as modified by the trial judge.

The request, with the grafted modification, must at the least have been confusing to the jury. We ourselves think it subject to the construction that it gave the jury to understand that, while it was not the duty

C., N. O. & T. P. Ry. Co. v. Wright.

of the enginemen on the north-bound train to so control the train as to be certain that it could be stopped before striking Wright, yet that it was their duty to so control the train as that the statutory precautions could be observed if and when deceased, Wright, again appeared in the view of the enginemen as an obstruction upon the track as they looked immediately ahead. Otherwise it seems that the trial judge would have refused the request outright.

Giving the charge this construction, it could only be held to be correct if the proposition of law advanced by appellee's counsel is sound, to wit: That the enginemen should, as by way of legal requirement, have maintained such a lookout ahead as that they could have discovered Wright as an obstruction on their track at or near the head of the curve, in order to preparation for the observance of the precaution, even if, to do so, they would be called to direct the line of vision away from the track, and striking distance thereof, across the "bowstring" of the curve.

May the statute, stringent as it is, be given any such construction? The language of the statute (Code, Shannon, sec. 1574) in respect to the duty imposed is "always upon the lookout ahead; and when any person, animal or other obstruction appears upon the road," the precautions shall be observed. The phrase "lookout ahead" in an early case was treated as equivalent to "ahead on the track" (*East Tennessee, etc., R. Co. v. St. John*, 5 Sneed [37 Tenn.] 525, 73 Am. Dec. 149), and to mean "the direction in which the en-

C., N. O. & T. P. Ry. Co. v. Wright.

gine is moving'' (*Patton v. Railway*, 89 Tenn. 370, 15 S. W., 919, 12 L. R. A., 184). The burden of showing compliance with the prescribed precautions arises only when the object appears on the track or within striking distance. *Cincinnati, etc., R. Co. v. Brock*, 132 Tenn., 477, 178 S. W., 1115.

A defense interposed by a railway company, in a case involving an injury to one on a curve, that its operatives on the engine were looking out across the intervening space at an object on the further end of the curve, would not be yielded to by the court as an excuse for their failure to observe an obstruction on the track appearing ahead of and near to the engine.

Only one case has been called to our attention that bears on the point, *Central, etc., Co. v. Vaughan*, 93 Ala., 209, 9 South., 468, 30 Am. St. Rep., 50, where it was held that the engineer on a moving train approaching a distant trestle on a curve in a cut is under no common-law duty (there being no statute governing the matter in Alabama) to withdraw his attention from the track in front of him and look across the country to see whether any one was on the trestle as an obstruction, and it was further held that evidence as to the fact that he might have seen such person on the trestle before entering the curve at a distance of 400 yards was not relevant or admissible on the question of negligence in failing to keep a proper lookout.

The principle may be sharply exemplified by an assumed case, that of a railroad, such as that of the plaintiff in error, running through a mountainous section,

making necessary sharp curves through deep cuts or tunnels. It cannot be maintained that the enginemen are required to look to the further end of such a curve, thereby withdrawing the lookout or line of vision from the track more immediately ahead of the engine thus assumed to be in or approaching the cut or tunnel.

The above charge of the trial judge imposed an undue burden on the railway company, and constitutes reversible error.

There is, furthermore, no duty to slacken the ordinary speed of a train approaching a curve in the open country, although the curve be in whole or in part in a cut, as a precaution against injury to persons walking on the track, but not seen or known so to be. *Hof-fard v. Illinois Cent. R. Co.*, 138 Iowa, 543, 110 N. W., 446, 16 L. R. A. (N. S.), 797, in which case the court said:

“No court has ever gone so far as to hold that it is incumbent on a railroad company to slacken the ordinary speed of its trains upon the approach to every curve in the track, which involves also a cut, as a precaution against injury to persons walking or working on the track. The reasons why such should not be the rule are obvious. Present-day conditions demand the maximum of speed consistent with train safety, this not only as in the interest of the operating company, but as related to the interests of the general public. Under a rule as contended for, such would not be possible of attainment in this country, where cuts and curves are of great frequency.”

C., N. O. & T. P. Ry. Co. v. Wright.

The same principle is applicable to the situation presented on a double-track railway where a train is approaching and passing the one on which is the lookout, and which, being on the track on the concave side of the curve, tends to obstruct the forward vision of the lookout from the engine on the track on the convex side of the curve. There is no duty imposed by the law on the operatives of the company to slow down the speed of the train to prevent possible injury to some one who may be walking on the track obscured from vision by the intervening train. Such a rule would seriously retard the business of transportation, and the only reason for it would be the anticipation that some person was without license making use of the track not designed for his use.

The facts of this case demonstrate that a double-tracked railway line is a far more perilous place for pedestrians than a single-track line. These tracks are constructed at great expense in order to make transportation safer and speedier, but such increase of peril is an incident not avoidable by the railway company.

Owing to the disposition we make of the case, we do not think it necessary to pass on another assignment of error to the effect that the verdict is excessive; but we do think it proper to say that on a retrial of the cause it should be borne in mind that the increase of peril above noted should be deemed to augment the negligence of deceased if he stepped from one of such tracks to another without taking care for his own safety.

Other questions are disposed of orally.

Reversed, and the cause remanded for a new trial.

CITY OF MEMPHIS *et al.* v. STATE *ex rel.* RYALS.***(Knoxville. September Term, 1915.)****1. CONSTITUTIONAL LAW. Construction.**

Under Const. U. S., Amend. 14, prohibiting the denial to any person of the equal protection of the law, and Const. Tenn., art. 1, sec. 8, prohibiting the imprisonment or execution of any person, or depriving him of life, liberty, or property, except by judgment of his peers or the law of the land, and article 11, sec. 8, forbidding class legislation, the same rules will be applied to classifications therein as to the classifications made in legislative enactments, so that the basis for a classification must be natural, and not arbitrary or capricious, and must rest on some substantial difference; but the classification is not invalid merely because it does not depend on scientific or marked differences. (*Post*, pp. 88-99.)

Acts cited and construed: Acts 1915, ch. 60.

Cases cited and approved: State *ex rel.* v. Schlitz Brewing Co., 104 Tenn., 730; Orient Ins. Co. v. Daggs, 172 U. S., 562.

Cases cited and distinguished: Motlow v. State, 125 Tenn., 547; Lindsley v. National Carbonic Gas Co., 220 U. S., 61.

Constitution cited and construed: Art. 1, sec. 8; art. 11, sec. 8.

2. CARRIERS. Constitutional law. Class legislation. Regulation of jitneys. Private conveyances.

Acts 1915, ch. 60, regulating jitneys as common carriers, and prohibiting their operation, except upon prescribed conditions, does not make an arbitrary classification between jitneys and privately owned automobiles, since the uses and character of operation of the two classes are distinct. (*Post*, pp. 99, 91.)

3. CONSTITUTIONAL LAW. Class legislation. Regulating jitneys. Street cars.

Acts 1915, ch. 60, regulating jitneys as common carriers, and prohibiting their operation, except upon prescribed conditions,

*As to regulation of jitney busses, see note in L. R. A., 1915 F. 840.

City of Memphis v. State ex rel.

does not make an arbitrary classification between jitney busses and street railway cars, since the jitney runs upon no track, and is less substantial and more dangerous than the street car, thus presenting essential differences, properly the subject of classification. (*Post*, p. 91.)

4. CONSTITUTIONAL LAW. Class legislation. Regulation of jitneys. Taxicabs.

Acts 1915, ch. 60, regulating jitneys as common carriers, and prohibiting their operation, except upon described conditions, does not make an arbitrary classification between jinteys and taxicabs, since taxicabs are for hire at a fare proportioned to the length of the trips of the several passengers, without regard to route, while the jitney carries passengers upon a designated route, and the investments in the two classes of machines are widely different. (*Post*, pp. 91-93.)

Cases cited and approved: *The Taxicab Cases*, 82 Misc. Rep., 94; *Yellow Taxicab Co. v. Gaynor*, 159 App. Div., 893; *Fifth Ave. Coach Co. v. New York*, 221 U. S., 467; *Provident Institution v. Malone*, 221 U. S., 660.

Case cited and distinguished: *St. John v. New York*, 201 U. S., 633.

5. CARRIERS. Carriers of persons. "Jitneys."

A "jitney" is a self-propelled vehicle, other than a street car, traversing the public streets between certain definite points or termini, and, as a common carrier, conveying passengers at a five-cent or some small fare, between such termini and intermediate points, and so held out, advertised, or announced. (*Post*, pp. 93-95.)

Case cited and distinguished: *Ex Parte Cardinal* (Cal.), 150 Pac., 348.

6. CONSTITUTIONAL LAW. Class legislation. Arbitrary classification.

Under the provisions of the constitution prohibiting class legislation, it is not sufficient to invalidate a statute merely to show points of similarity in the thing classified, and the thing ex-

City of Memphis v. State *ex rel.*

cluded from the classification; but it must be shown that the classification is unreasonable and impracticable. (*Post*, pp. 95-97.)

Cases cited and approved: *Mehlos v. Milwaukee*, 156 Wis., 591; *Central Lumber Co. v. South Dakota*, 226 U. S., 157; *People v. Coolidge*, 124 Mich., 664; *Gibbs v. Talley*, 133 Cal., 373.

7. MUNICIPAL CORPORATIONS. Streets. Legislative control. Jitneys.

The legislature, being endowed with police power to regulate the use of streets in public places, may prescribe the conditions with which jitneys, being common carriers, must comply in order to operate. (*Post*, pp. 97, 98.)

Cases cited and approved: *Fifth Ave. Coach Co. v. New York*, 194 N. Y., 19; *State v. Howell* (Wash.), 147 Pac., 1159; *Greene v. City of San Antonio* (Tex. Civ. App.), 178 S. W., 6; *Ex Parte Dickey* (W. Va.), 85 S. E., 781.

FROM SHELBY.

Appeal from the Circuit Court of Shelly County.—
A. B. PITTMAN, Judge.

C. M. BRYAN, LEO GOODMAN and CHAS. T. CATES, JR.,
for appellants.

CARUTHERS EWING, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

Ryals, as relator, sued out a writ of *habeas corpus* to effect his release from the custody of the chief of police of the city of Memphis; he having been arrested for a violation of Acts 1915, c. 60. The circuit judge

City of Memphis v. State ex rel.

released the relator, holding that act void, because violative of the constitutional provisions that inhibit arbitrary class legislation. Const. Tenn., art. 1, sec. 8, and article 11, sec. 8; fourteenth amendment of the Constitution of the United States.

The act thus attacked was evidently passed for the regulation of a class of motor vehicles recently brought into service in the principal cities of the state, commonly known as "jitneys."

By section 1 of the act it is provided that any person, firm, or corporation operating for hire any public conveyance propelled by steam, gasoline, or other power, "for the purpose of affording a means of street transportation similar to that ordinarily afforded by street railways (but not operated upon fixed tracks) by indiscriminately accepting and discharging such persons as may offer themselves for transportation," is declared a common carrier, and the business of all such carriers is declared to be a privilege.

Section 2 of the act makes unlawful the use and occupation of any street or alley or other public place in any incorporated city or town without first obtaining from such city or town a permit or license by ordinance giving the right to so use or occupy such street, alley or other public place—the permit or license to embody "such routes, terms and conditions as such city or town may elect to impose: Provided, however, that no such permit or license shall be granted which does not require the execution and filing of a bond," as provided by section 3.

City of Memphis v. State *ex rel.*

Section 3 provides that before such common carrier may conduct his business he must execute a bond, with good and sufficient surety or sureties, in no case to exceed \$5000 for each car operated, conditioned that such common carrier will pay any damage that may be adjudged finally against such carrier as compensation for loss of life or injury to person or property inflicted by such carrier or caused by his negligence.

Section 4 makes it unlawful for such common carrier to use or occupy any street or alley or other public place without the permit or license aforesaid or without first executing and filing the bond as required by section 3.

The subsequent sections need not be outlined, since the provision requiring the execution of a bond is the only one inveighed against by relator, charged as he was with the operation of a jitney automobile without having executed such bond.

The circuit judge, after calling attention in his opinion to the fact that the act does not limit the condition of the bond to a protection of the passengers of such a common carrier, but includes the payment of damages by reason of negligence resulting in injury to pedestrians or to property generally, expressed the view that the provision of the statute might be upheld if the bond required had to do only with the protection of passengers, and further said:

“This act imposes upon the carrier burdens not only in his character of common carrier, but also burdens in his capacity of an ordinary user of the streets. Us-

City of Memphis v. State *ex rel.*

ing the same kind of vehicle, with the same motor power, in identically the same manner as private operators of automobiles, he is required to give a bond to protect other users of the streets against his negligence. No such requirement is made of any other person using similar vehicles.”

The act was therefore held invalid, with result that the city has appealed to this court.

Under the provisions of the State and national constitutions, above referred to, the same rules are applied as to the validity of classifications made in legislative enactments. When an effort is thus made to distinguish and classify as between citizens, the basis therefor must be natural, and not arbitrary or capricious. The classification must rest on some substantial difference between the situation of the class created and other persons to whom it does not apply. *State ex rel. v. Schlitz Brewing Co.*, 104 Tenn., 730, 59 S. W. 1033, 78 Am. St. Rep., 941, and cases cited.

However, classification for such purposes is not invalid because not depending on scientific or marked differences in things and persons, or in their relations. It suffices if it is practical, and it is not reviewable unless palpably arbitrary. *Orient Ins. Co. v. Daggs*, 172 U. S., 562, 19 Sup. Ct., 281, 43 L. Ed., 552, cited with approval in *State ex rel. v. Schlitz Brawing Co.*, supra.

“When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be as-

City of Memphis v. State *ex rel.*

sumed. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Motlow v. State*, 125 Tenn., 547, 145 S. W., 177, following *Lindsley v. National Carbonic Gas Co.*, 220 U. S., 61, 31 Sup. Ct. 337, 55 L. Ed., 369, Ann. Cas., 1912C, 160.

Having these principles in mind for guidance, we may conceive that, from the experience developed by the operation of jitney automobiles at the time of the enactment of the regulatory statute, the legislature deemed the provision for a bond to be necessary because it realized that by reason of the small fare charged by such operators the tendency would be for them to invest in cheap or secondhand machines, oftentimes fragile in character; that frequently the vehicle would not be owned outright, but only subject to a lien or by way of lease; that, by reason of the limited size and carrying capacity of the conveyances, an increased congestion of the streets and public places would follow, as well as an overtaxing of the capacity of the given conveyance; that they would have no fixed track upon which to run, moving at will over the entire street surface, and in their crossing over and stopping along the curb between crossings, or at street crossings, danger to persons and property would be augmented; that, by reason of the competition of the many engaged in the business, frequent contests between the operators for points of vantage in the streets would follow; that there was a tendency fraught with

danger in the many so engaged, seeking the streets of heaviest travel for passengers, thus leading to congestion, as well as in hasty efforts made to head off and divert those waiting on the curb as offerers for passage on street railways; that the desire and necessity to collect many small fares would tempt operators to indulge in swift and careless running; that by reason of receiving and discharging passengers at short, unscheduled intervals, there would be an interruption of traffic and an endangering of other vehicles in the streets; that by reason of the small investment required many who are financially irresponsible would embark in the business; that the collection of damages from the operators would be difficult, and in many instances impossible.

We come now to the test of the law made by the circuit judge, and which led him to denounce the classification—the inclusion of jitney automobiles and the exclusion of automobiles privately owned and used. We think that such a classification is easily sustainable by reason of the applicability of many of the considerations above enumerated. The privately owned vehicle ordinarily has but a single destination, at which it comes to rest. Its use is not urged to or towards the limit in order to the reaping of profits. We are unable to see merit in the distinction taken by the circuit judge, when he intimated the opinion that a classification of the jitney from privately used automobiles might be sustained only so far as indemnity for damages done to passengers was concerned. Most of the

City of Memphis v. State *ex rel.*

dangers that surround such passengers in a substantial sense beset also the users of the street.

Contrasting the jitney with street railway cars, to ascertain whether there be arbitrary classification: The street railway, by reason of its having tracks at definite places assigned it by municipal authority, on which tracks its traffic must move, is less liable to cause injury; and the substantial nature of its cars, and particularly the fixity, permanency, and great cost of its roadbed, give an anchored indemnity in respect of its liability for negligence. Other marks for differentiation, appearing in the above outline of considerations imputable to the legislative mind, need not be reiterated.

Assuming for test purposes (without meaning to decide or to intimate a decision) that taxicabs are common carriers, and that they are not included within the terms of the statute, does their exclusion operate to make the classification unreasonable and arbitrary?

The word "taxicab" is one of recent coinage, to describe a motor-driven conveyance that performs a service similar to the cab or hackney carriage, held for hire at designated places at a fare proportioned to the length of the trips of the several passengers, who are taken to be carried to destinations without regard to any route adopted or uniformly conformed to by the operator. The jitney holds itself out to accommodate persons who purpose traveling along a distinct route chosen by the operator. Operators of taxicabs have not the temptation or necessity, we may assume,

City of Memphis v. State *ex rel.*

of choosing the most traveled streets, since those less traveled afford them better opportunities to serve the object their owners have in view. It may be that a larger investment is ordinarily required to enter the taxicab business than the other, and that the conveyances would be less in number on this account, as well as because of the greater fare charged, not to mention other differences to be drawn from the above summary. In New York an ordinance regulating the conduct of the business of public hackmen has been held not to be discriminatory, because it applied only to those engaged in transporting passengers for hire who solicit business on the streets, or because taximeters are required to be attached to motor-driven vehicles only. *The Taxicab Cases*, 82 Misc. Rep., 94, 143 N. Y. Supp., 279, affirmed under style *Yellow Taxicab Co. v. Gaynor*, 159 App. Div., 893, 144 N. Y. Supp., 299.

The supreme court of the United States has held that the inclusion of producing, and the exclusion of non-producing, venders of milk in legislation was valid, the court saying:

“A picture is exhibited of producing and non-producing venders (of milk) selling milk side by side; the latter, it may be, a purchaser from the former; the act of one permitted, the act of the other prohibited or penalized. If we could look no farther than the mere act of selling, the injustice of the law might be demonstrated; but something more must be considered. Not only the final purpose of the law must be consid-

City of Memphis v. State *ex rel.*

ered, but the means of its administration—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose.” *St. John v. New York*, 201 U. S., 633, 26 Sup. Ct., 554, 50 L. Ed., 896, 5 Ann. Cas., 909, affirming 178 N. Y. 617, 70 N. E., 1104.

The same court upheld a classification of vehicles (in respect of their respective owners’ rights to use the streets) by which advertising wagons or busses were excluded, while ordinary business wagons, when engaged in the usual business of the owner, and not used merely or mainly for advertising, were permitted to use the streets while exhibiting business notices. *Fifth Ave. Coach Co. v. New York*, 221 U. S., 467, 31 Sup. Ct., 709, 55 L. Ed., 816, affirming 194 N. Y. 19, 86 N. E., 824, 21 L. R. A. (N. S.), 744, 16 Ann. Cas., 695. See, also, *Provident Institution v. Malone*, 221 U. S., 660, 31 Sup. Ct., 661, 55 L. Ed., 899, 34 L. R. A. (N. S.), 1129.

The word “jitney” we think may be defined to be a self-propelled vehicle, other than a street car, traversing the public streets between certain definite points or termini, and as a common carrier conveying passengers at a five-cent or some small fare, between such termini and intermediate points, and so held out, advertised, or announced.

In the case of *Ex parte Cardinal* (Cal.), 150 Pac., 348, where was involved an ordinance substantially so defining a jitney, and requiring the owner, before operating such machine, to obtain a permit, and to give a

City of Memphis v. State *ex rel.*

bond or provide a policy of insurance to protect those injured, the court upheld the ordinance as not creating an arbitrary class, and said:

“It is manifest that as to automobiles there may be circumstances existing, by reason of the manner and character of their use on the streets, that will warrant, in the interest of the safety of the public, special regulations as to those used for a particular purpose and in a particular way. . . . We entertain no doubt whatever as to the power of the board of supervisors of the city and county of San Francisco to make special regulations relating to the use on the streets of such vehicles as are described in section 1 of the ordinance, and therein termed jitney busses. It is argued that the charge of ten cents or less for passage is no proper criterion by which to classify for such a purpose as that of this ordinance. It may well be, however, that the special danger to the public sought to be guarded against is confined to just the class of vehicles described, viz., automobiles used on the public streets for the carriage of passengers at a very small charge. . . . It is the ‘low fare’ automobile for the carriage of passengers on the streets of San Francisco that the ordinance is designed to regulate. The real question in this connection is whether there is sufficient distinction between the operation on the public streets of these ‘low charge’ automobiles for the carriage of passengers and the operation of self-propelled motor cars on which a much higher charge is made, to warrant the imposition of the special regulations made by

City of Memphis v. State *ex rel.*

this ordinance. It is a matter of common knowledge on the part of those familiar with conditions in our large cities that the comparatively recent introduction of this class of vehicle, commonly known as the 'jitney,' for the carriage of passengers on the public streets, for a charge closely approximating that made on street cars, in view of the almost phenomenal growth of the institution, has made clearly apparent the necessity of some special regulations in order to reasonably provide for the comfort and safety of the public. It may well be that the board of supervisors concluded that, in view of the number of this class of public conveyances that were operated upon the public streets, especially upon the principal streets already occupied almost to overflowing during the hours of heaviest traffic by street cars and other vehicles, as well as by pedestrians at street crossings, the speed at which they would naturally be operated in order to make them pay on such a low rate of fare, and the probable lack of substantial financial responsibility on the part of very many undertaking to operate such vehicles, special regulations as to condition of car . . . as well as security to protect against improper or negligent operation, were essential to the public safety. We certainly cannot say that the legislative body was not justified in so determining."

Counsel for the appellee relator treats his case against the act as made out if he be able to present some points of similarity in the jitney and the taxicab or privately operated automobile. But mathematical

City of Memphis v. State *ex rel.*

or logical exactness, in every aspect, in a division for classification is not always possible, and it is not required in order to validity. "The best that can be done is to keep within the clearly reasonable and practicable. That is accomplished where there are such general characteristics of the members of the class as to reasonably call for special legislative treatment. That may be true, generally, and yet some such characteristics sometimes may be found to exist outside the boundaries of the class." *Mehlos v. Milwaukee*, 156 Wis., 591, 146 N. W., 882, 51 L. R. A. (N. S.), 1009, Ann. Cas., 1915C, 1102; *Central Lumber Co. v. South Dakota*, 226 U. S., 157, 33 Sup. Ct., 66, 57 L. Ed., 164; *Motlow v. State*, *supra*; 6 R. C. L., p. 360, sec. 373.

We therefore hold that the segregation of the jitney automobile for regulation in the matter of the execution of an indemnity bond by its owner is not vicious or unreasonable class legislation.

Counsel for appellee commends to our consideration *People v. Coolidge*, 124 Mich., 664, 83 N. W., 594, 50 L. R. A., 493, 83 Am. St. Rep., 352, and *Gibbs v. Tally*, 133 Cal., 373, 65 Pac., 970, 60 L. R. A., 815. In the first of these cases it was held that an act, requiring all merchants who sell farm produce on a commission to execute a bond of \$5,000 to faithfully perform their contracts, was unwarranted class legislation, and that the act could find no support in the police power, since there was nothing in the business hostile to the comfort, health, morals, or even convenience of a community. The second case involved an effort on the part

City of Memphis v. State *ex rel.*

of the legislature to require the owner of property, who contracts for the placing of a building thereon, to furnish a bond for the benefit of laborers and material-men on terms that would make him liable for twenty-five per cent. above the contract price. The court held that the act there in question was not justifiable by the police power, and was violative of constitutional provisions pointed out.

We fail to see the pertinency of these cases to the one at bar, which involves the right to regulate a common or public carrier in respect of the use of public streets.

It is too clear for extended discussion that it was competent for the legislature under the police power to regulate the use of the streets and public places by jitney operators, who, as common carriers, have no vested right to use the same without complying with a requirement as to obtaining a permit or license. The right to make such use is a franchise, to be withheld or granted as the legislature may see fit. *Dill. Mun. Corp.*, secs. 1210, 1229; *Fifth Ave. Coach Co. v. New York*, 194 N. Y. 19, 86 N. E., 824, 21 L. R. A. (N. S.), 744, 16 Ann. Cas., 695. Further, the use or license may be conditioned on the execution of a bond for the indemnification of those injured. So held in respect of motor-propelled vehicles in the recent cases of *State v. Howell* (Wash.), 147 Pac. 1159, *Greene v. City of San Antonio* (Tex. Civ. App.), 178 S. W. 6, *Ex parte Dickey* (W. Va.), 85 S. E., 781, and *Ex parte Cardinal*, *supra*.

City of Memphis v. State *ex rel.*

We are of opinion that the statute is not subject to the objections urged by the appellee, and that therefore the lower court erred in its disposition of the case. Reversed and remanded; all costs to be paid by the relator.

Memphis St. Ry. Co. v. Rapid Transit Co.

**MEMPHIS ST. RY. CO. v. RAPID TRANSIT CO.,
et al.**

(*Knoxville*. September Term, 1915.)

1. CONSTITUTIONAL LAW. Constitutional questions. Necessity of decision.

The supreme court on appeal has jurisdiction and will determine the constitutionality of a law, although the cause can be decided upon other grounds, where the constitutional question is made in good faith and relied on in the case, since by Acts of 1907, ch. 82, establishing and defining the powers of the court of civil appeals, jurisdiction of that court is defeated by the presence of a constitutional question. (*Post*, pp. 104-107.)

Acts cited and construed: Acts 1907, ch. 82; Acts 1915, ch. 60.

Case cited and approved: *Campbell Co. v. Wright*, 127 Tenn., 1.

2. LICENSES. Carriers. Jitneys.

Under Acts 1915, ch. 60, making jitneys common carriers, and requiring them, under ordinances of the cities or towns, to file bonds and perform the conditions of the statute and ordinances, a jitney company is altogether without right to do business on the streets of a city, where the city has passed no ordinance pursuant to the act, and the company has failed to procure any license or execute any bond under the act. (*Post*, pp. 107, 108.)

Case cited and approved: *City of Memphis et. al. v. State ex rel. Ryals*, 133 Tenn., 83.

3. INJUNCTION. Right to invoke. Exclusive franchise.

Where the plaintiff street railway company has a franchise from the city, its franchise is a property right, under which it can restrain any person from becoming a common carrier of passengers in competition with it without legislative or municipal authority, and for that purpose its franchise is exclusive against all persons upon whom similar rights have not been conferred. (*Post*, pp. 108-114.)

 Memphis St. Ry. Co. v. Rapid Transit Co.

Cases cited and approved: Raritan & Delaware Bay R. R. Co. v. Delaware & Raritan Canal Co., 18 N. J. Eq., 546; Penn. R. R. Co. v. Nat. R. R. Co., 23 N. J. Eq., 441; Jersey City Gas Co. v. Dwight, 29 N. J. Eq., 242; Elizabethtown Gas Co. v. Green, 46 N. J. Eq., 118; Patterson v. Wollmann, 5 N. D., 608; Green v. Ivey, 45 Fla., 338; Tugwell v. Ferry Co., 74 Tex., 480; Bartlesville Elec. L. & Power Co. v. Bartlesville I. R. Co., 29 L. R. A. (N. S.), 77.

4. INJUNCTION. Right to remedy. Doubtful case.

An injunction will not be awarded to protect an alleged right, except upon a clear case. (*Post*, pp. 114, 115.)

Cases cited and approved: Geneva-Seneca Electric Co. v. Economic Power & Const. Co., 136 App. Div., 219; Coffeyville Min. & Gas Co. v. Citizens' Natural Gas & Min. Co., 55 Kan., 173; Market St. Ry. Co. v. Pen. Ry. Co., 51 Cal., 583.

5. INJUNCTION. Right to remedy. Grounds.

Where, under an act of the legislature, municipalities are authorized to regulate by ordinance, subject to the statute, the operation of jitney busses as common carriers, and the city counsel fails to regulate, a street railway company can have the operation of jitneys enjoined, since the city council might fail to act at all under the statute, and thus the rights of the company be unlawfully invaded. (*Post*, pp. 115, 116.)

Case cited and approved: Levisay v. Delp, 68 Tenn., 415.

Code cited and construed: Secs. 1697, 1703 (S.).

6. MUNICIPAL CORPORATIONS. Unauthorized operation of jitneys. Nuisance. Injunction.

Where statute authorizes the regulation of jitneys, and prohibits their operation, except upon conditions named, and those conditions are not fulfilled, but many jitneys are operated with consequent danger to persons and property, they constitute a nuisance, and may be enjoined on the bill of a private individual who can show special damage to himself. (*Post*, pp. 116-118.)

Cases cited and approved: Weakley v. Page, 102 Tenn., 179; Richi v. Chattanooga Brewing Co., 105 Tenn., 651; Weidner v.

Memphis St. Ry. Co. v. Rapid Transit Co.

Friedman, 126 Tenn., 677; Sloss-Sheffield Steel Co. v. Johnson, 147 Ala., 384.

**7. MUNICIPAL CORPORATIONS. Obstruction of streets.
Right to remedy.**

Relief by an injunction against a nuisance by which the highway is obstructed need not be sought by an abutting owner, but may be had by any individual who can show special damage to himself. (*Post*, pp. 118-120.)

Cases cited and approved: *Eldert v. Long Island Elec. R. Co.*, 28 App. Div., 451; *People's Gas Co. v. Tyner*, 131 Ind., 277; *Keystone Bridge Co. v. Summers*, 13 W. Va., 476.

Case cited and distinguished: *Draper v. Mackay*, 35 Ark., 497.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
—F. H. HEISKELL, Chancellor.

CHARLES T. CATES, JR., and WRIGHT, MILES, WARING
& WALKER, for appellant.

CARUTHERS EWING, for appellees.

MR. JUSTICE GREEN delivered the opinion of the Court.

This bill was filed by the Memphis Street Railway Company to enjoin the Rapid Transit Company and other defendants from operating jitneys on the streets of Memphis in competition with the complainant's street cars. A demurrer was interposed by defend-

Memphis St. Ry. Co. v. Rapid Transit Co.

ants, and sustained by the chancellor, and the complainant has appealed to this court.

Complainant alleged that it was organized under the laws of Tennessee, and had a franchise from the city of Memphis to operate a street railway system in that city; that it had expended in excess of \$10,000,000 in constructing and equipping its street railway lines; that it operated about one hundred and twenty-nine miles of track, extending over all parts of the city; and that it had complied with all the laws of Tennessee and all the terms of its franchise from the city of Memphis.

The bill further averred that the defendants were engaged in operating jitneys or jitney busses upon the streets of Memphis in competition with the complainant, and that defendants were conducting this business without having made any attempt to comply with the statute of Tennessee regulating said business; that said defendants were operating their automobiles on the same streets upon which complainant ran its cars; that the jitneys were running at high rates of speed, cutting in front of complainant's cars, and racing by the cars in their efforts to reach the stopping places first, in order to pick up passengers; that they frequently ran in front of complainant's cars, thus forcing the cars to be stopped in order to prevent accident; that they often ran dangerously close to and by complainant's cars while the cars were standing for the purpose of taking off and discharging passengers, thereby causing many very serious accidents and even

Memphis St. Ry. Co. v. Rapid Transit Co.

deaths. It was said that such operation of the said jitneys was hindering and impeding complainant from giving first-class service; that such illegal and unauthorized competition was depriving complainant of a large amount of revenue, by unlawfully diverting from it intended passengers upon its cars. The bill contains other charges upon which it is not necessary to dwell.

The general assembly of Tennessee, in 1915, by chapter 60, Acts of that year, undertook to regulate the jitney business in the cities and towns of this State. This act declared those operating such vehicles to be common carriers, and provided that the operation of these conveyances should be unlawful in the incorporated cities or towns of this State without first obtaining a permit or license under ordinance from said city or town, and it was further provided that no such license should be issued unless the owner or operator filed with the clerk of the county court in the county in which the business was proposed to be done, a bond of not less than \$5,000 to cover loss of life or injury to person or property inflicted by such carrier or caused by his negligence. It was further enacted that said license should embody such routes, terms, and conditions as the city or town might elect to impose, provided that no such permit or license should be granted which did not require the execution and filing of the bond mentioned above. Said act is set out in the margin of this opinion.¹

¹ An act to define as common carriers within this State, persons, firms and corporations operating certain self-propelling public conveyances and affording means of street transportation similar

Memphis St. Ry. Co. v. Rapid Transit Co.

The demurrer of defendants challenges the constitutionality of the act referred to and relied on by complainant. It does not distinctly appear whether the chancellor passed on the constitutionality of the statute or based his decision on other grounds of the demurrer. It is said by counsel for defendants that the result below was reached without consideration of the validity of the act in question, and it is urged that the case can be determined in this court without reference to the said act. Defendants therefore insist that this court is without jurisdiction, and the case is properly one for the court of civil appeals; that no constitutional question is involved.

We are referred to cases in which it is said that the constitutionality of a statute will not be considered or

to that ordinarily afforded by street railways but not operated upon fixed tracks, to declare the business of all such common carriers a privilege and to forbid and declare a misdemeanor their operation upon streets, alleys, public places of incorporated cities or towns without obtaining permits or licenses from such cities or towns and giving bond to indemnify against loss of life and damage to person and property; and to authorize incorporated cities and towns of this State to grant permits and licenses to such carriers to operate over streets, alleys and public places and to fix routes, terms and conditions of such operation, and to limit such operation in the interest of public convenience and safety, and to impose a tax for the exercise of the privilege herein granted.

Section 1. Be it enacted by the general assembly of the State of Tennessee, that any person, firm or corporation operating for hire any public conveyance propelled by steam, compressed air, gasoline, naphtha, electricity or other motive power for the purpose of affording a means of street transportation similar to that ordinarily afforded by street railways (but not operated upon fixed tracks) by indiscriminately accepting and discharging such persons as may offer themselves for transportation along the way and course of operation, be and the same is hereby declared and defined to be a common carrier, and the business of all such common carriers is hereby declared to be a privilege.

Section 2. Be it further enacted, that it shall be unlawful for any common carrier as defined in section 1 of this act, to use or

Memphis St. Ry. Co. v. Rapid Transit Co.

adjudged if the case can be otherwise decided. We do not think, however, such a rule should control here. We have formerly said that, when any question involving the constitutionality of an act of the legislature is *bona fide* made and relied on in a case, this court should take appellate jurisdiction of such a case under chapter 82, of the Acts of 1907. *Campbell County v. Wright*, 127 Tenn., 1, 151 S. W., 411.

The chief contention of complainant in this case is that defendants are outlaws on the streets of Memphis, with no right to pursue their business, by reason of the fact that the city has passed no ordinance giving them permission to operate, and because they have made no bonds, according to the provisions of chapter 60, Acts

occupy any street, alley or other public place in any incorporated city or town of this State without first obtaining from such city or town a permit or license by ordinance giving the right to so use or occupy such street, alley or other public place, such permit or license to embody such routes, terms and conditions as such city or town may elect to impose: Provided however, that no such permit or license shall be granted which does not require the execution and filing of a bond as provided for in section 3 of this act.

Section 3. Be it further enacted, that any such common carrier, before operating any public conveyance as aforesaid, in addition to obtaining a permit or license as aforesaid, shall execute to the State of Tennessee and file with the clerk of the county court of the county in which the business is to be carried on, and renew or increase from time to time as may be required by such city or town, a bond with good and sufficient surety or sureties, to be approved by the mayor of such incorporated city or town, in such sum as such city or town may reasonably demand (in no case, however, in a sum less than five thousand dollars for each car operated), conditioned that such common carrier will pay any damage that may be adjudged finally against such carrier as compensation for loss of life or injury to person or property inflicted by such carrier or caused by his negligence.

Section 4. Be it further enacted, that any common carrier as defined in section 1, of this act which shall use or occupy any street, alley or other public place in any incorporated city or town of this State without first obtaining a permit or license to so use and occupy such street, alley or other public place, or shall operate any

Memphis St. Ry. Co. v. Rapid Transit Co.

of 1915. Defendants, as we have said, challenge the constitutionality of this act. We think, therefore, the constitutional question in this case is *bona fide*, and that constitutional rights are relied on.

Although we appreciate the delicacy of passing on the validity of an act of the legislature, such a duty is often imposed upon us, and we must not dodge our jurisdiction. Where an act of the legislature undertakes to regulate a particular subject, and the application of such an act is invoked by one party in a suit involving that subject, and the validity of the act is questioned by the other party, we think it proper that the statute should be tested. Statutes are enacted to make the law plain and rights distinct. They are intended to be administered, and it is not incumbent upon

such conveyance without first executing and filing bond as required by section 3 of this act shall be guilty of a misdemeanor and shall upon conviction be fined not less than fifty dollars nor more than one hundred dollars for each offense, and each day upon which such common carrier shall so unlawfully use or occupy any street, alley or other public place in any incorporated city or town of this State, shall constitute a separate offense.

Section 5. Be it further enacted, that all incorporated cities and towns of this State be and they are hereby authorized and empowered to grant permits or licenses to such common carriers to operate over the streets, alleys and public places of such cities and towns, and to fix in such licenses and permits the routes, terms and conditions upon which such common carriers may operate, subject to the limitations contained in section 2 of this act: Provided that no license or permit shall be granted to any such common carrier without the execution and filing of bond as required by section 3 of this act being required.

And all such incorporated cities and towns are hereby authorized and empowered to impose upon all such common carriers a tax for the exercise of the privilege herein granted.

Section 6. Be it further enacted, that if any section or part of this act be for any reason held unconstitutional or invalid, such holding shall not affect the validity or the remaining portions of this act, but such remaining portions shall be and remain valid.

Section 7. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it.

Memphis St. Ry. Co. v. Rapid Transit Co.

the courts to enter upon a difficult and doubtful investigation of the rights of the parties under the common law—such rights being defined by a statute—merely to avoid passing on the constitutionality of such a statute.

So we think that there is a constitutional question in this case properly made, and that this court has appellate jurisdiction.

Chapter 60, Acts of 1915, has been considered, and the act adjudged valid and constitutional, in the case of *City of Memphis et al. v. State of Tennessee ex rel. S. B. Ryals*, 179 S. W., 631, opinion in which has just been filed by Mr. Justice Williams. It is not, therefore, necessary to further discuss this question in this opinion.

The act being valid, there is little trouble as to its proper construction. We have heretofore intimated our conception of its meaning. Under it, no jitney may be operated in any city or town of the State of Tennessee, except under a license or permit from said city or town, issuing under an ordinance passed in conformity with the said statute, nor shall such permit or license be issued until the statutory bond has been executed and filed with the county court clerk. In other words, jitneys have no right to operate on the streets of any incorporated city or town in Tennessee until an ordinance has been passed providing for licenses or permits, and such permits or licenses have been secured, and they have no right then to operate until they have made bond as required by the statute.

Memphis St. Ry. Co. v. Rapid Transit Co.

In the case before us the city of Memphis has passed no ordinance authorizing the issuance of licenses or permits to engage in this business, nor have the defendants undertaken to procure any such licenses, nor have they executed any bonds.

It is very clear, then, that defendants have no right whatever to do business on the streets of Memphis. They are lawbreakers, subject to criminal prosecution, operating in direct violation of the statute of this State.

These conclusions upon the statute being reached, many of the questions presented by the demurrer of defendants as to their common-law rights are eliminated from further consideration. The *status* of defendants is fixed by the act. There remains, however, the question as to the right of the complainant to an injunction against defendants under the circumstances above detailed.

The complainant does not seek an injunction here on the theory that it is possessed of an exclusive franchise to conduct the business of common carrier of passengers on the streets of Memphis. The contention of complainant is that, having been granted a franchise as such common carrier, it has a property right that will entitle it to restrain any person or corporation from attempting to engage in the business of common carrier of passengers on the streets of Memphis, in competition with complainant, without legislative or municipal authority. Complainant concedes that its franchise is not exclusive, in the sense that a similar

Memphis St. Ry. Co. v. Rapid Transit Co.

franchise might not be granted to another to be exercised and enjoyed in the city of Memphis; but it maintains that its franchise is exclusive against all persons upon whom similar rights have not been conferred by legislative sanction.

We think this contention is well founded and supported by the great body of authority. In Pomeroy's Equity Jurisprudence it is said:

“An injunction is the appropriate remedy to protect a party in the enjoyment of an exclusive franchise against continuous encroachments. Such continuous encroachments constitute a private nuisance, which courts of equity will abate by injunction. The jurisdiction rests on the firm and satisfactory ground of its necessity to avoid a ruinous multiplicity of suits, and to give adequate protection to the plaintiff's property in his franchise. To be entitled to relief, a plaintiff need only show that he is entitled to a franchise, and that there is continuous interference therewith by the defendant. It is not necessary that the plaintiff first establish his right at law.” Pomeroy's Eq. Jur., sec. 583.

Further it is said:

“It is not necessary ‘to entitle the owner to relief in equity, that the franchise should be an exclusive franchise in the sense that the granting of another franchise to be exercised and enjoyed at the same place would be void.’ The theory is ‘that the defendant who has no franchise, is acting in violation of law in operating . . . without authority from the sov-

Memphis St. Ry. Co. v. Rapid Transit Co.

ereign power, and that the owner of the franchise may complain of and restrain such illegal acts when they result in injury to his franchise, which, in the eye of the law, is property. As to the one who is invading his rights without legal sanction, the franchise is an exclusive franchise, although the owner of it might not be entitled to any protection as against the granting of a similar franchise to another.' '' Pomeroy's Eq. Jur., sec. 584.

In dealing with a controversy between two electric light companies, one without a franchise, the supreme court of Oklahoma observed:

“When plaintiff accepted its franchise, it did so subject to the power of the municipality to grant other persons or corporations similar franchises, and with the knowledge that it might be compelled to exercise its rights under its franchise with others exercising similar rights. If, by the competition of rival companies to whom the use of the streets and public grounds has been granted by the municipality, plaintiff is rendered unable to discharge the obligations of its contract to furnish the city and its inhabitants with light and power at stipulated prices, except at a financial loss to it, plaintiff cannot complain, for it must be held to have contemplated such condition might arise, and to have agreed thereto when it accepted the franchise; but such cannot be said of the defendant, who unlawfully occupies the streets and public grounds of the city in competition with plaintiff. By its unlawful acts defendant can and will take from plaintiff

Memphis St. Ry. Co. v. Rapid Transit Co.

a portion of its business. At the same time, defendant is under no obligation to the city or its inhabitants, and is all the while maintaining upon the streets and public grounds of the city a public nuisance, and the loss plaintiff sustains is to defendant its fruits from its violation of the law. By these unlawful acts of defendant, plaintiff may be rendered financially unable to comply with the obligations of its contract, and may be subjected to suits for damages, mandamus proceedings to enforce the performance of its contract, or an action to forfeit its franchise. Defendant does not undertake to compete with plaintiff for the business of the city and its inhabitants by furnishing to them light and power other than by the use of the streets and alleys. Its right to sell light and power is not dependent upon any franchise, but its right to use the streets and public grounds of the city for that purpose does depend upon the consent of the city; and, when it uses the streets without that consent, it is not only guilty of maintaining a public nuisance, but also inflicts upon plaintiff a special injury by its unlawful act, which may be restrained.” *Bartlesville E. L. & P. Co. v. Bartlesville I. R. Company*, 26 Okla., 457, 109 Pac., 229, 29 L. R. A. (N. S.), 81.

In a similar case the New Jersey court said:

“Legislative grants of franchises of the nature claimed by complainant, whether granted by special . . . privileges which are necessarily exclusive in their nature as against all persons upon whom similar rights have not been conferred, for any attempted

Memphis St. Ry. Co. v. Rapid Transit Co.

exercise of such rights, without legislative sanction, is not only an unwarranted usurpation of power, but operates as a direct invasion of the private property rights of those upon whom the franchises have been so conferred. *Raritan & Delaware Bay R. R. Co. v. Delaware & Raritan Canal Co.*, 18 N. J. Eq. (3 C. E. Gr.), 546, 569; *Penn. R. R. Co. v. Nat. R. R. Co.*, 23 N. J. Eq. (8 C. E. Gr.), 441, 447; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. (2 Stew.), 242, 250; *Elizabeth-town Gas Co. v. Green*, 46 N. J. Eq. (1 Dick.), 118, 124 (18 Atl. 844). It follows that, if complainant is at this time entitled to exercise in the disputed territory the privileges set forth in the legislative act referred to, and defendant, as claimed, enjoys no legislative sanction for the conduct sought to be enjoined, complainant will be entitled to the relief prayed for." *Millville Gas L. Co. v. Vineland L. & P. Co.*, 72 N. J. Eq., 305, 65 Atl., 504.

The same question has often arisen with reference to ferries, and the courts have awarded injunction against the operation of unlicensed ferries at the suit of the ferryman legally authorized to conduct his business.

In one of these cases the supreme court of Mississippi said:

"A public ferry cannot be erected and operated in this State without a special license therefor, and such license bestows upon the licensee the exclusive right of such ferry—exclusive as to all persons, except that the board of supervisors may establish as many ferries

Memphis St. Ry. Co. v. Rapid Transit Co.

as the public convenience may require at the same or adjacent places of crossing. Every such licensee, however, is required to give bond with security for the performance of the obligations assumed by him, which impose upon him the duties of keeping a proper and safe boat and equipments, and of his constant attendance at the ferry, and of the due and speedy transportation over it of all persons and property desired to be transported, and to secure these and other stringent duties required of him he is placed under heavy liabilities, civil and criminal, for their performance, all of which is necessary for the public convenience, and as a remuneration for his services and liabilities he is allowed a fixed rate of ferriage. The right secured to the licensee is a legal right, created by public law, and not to be infringed except by the authority of the State itself; and such right would be of no avail, unless the party holding it is protected by law in its enjoyment. Indeed, it is a maxim of law that there is no right without a remedy, for 'whosoever the law giveth any right,' says Coke, 'it also giveth a remedy.' Coke on Litt., 56. The ferry right of appellant should have secured to him the tolls lost to him by the infringement of his right by the defendants, and they should make him whole for the damages that he has sustained, to be measured by the amount of tolls diverted." *McInnis v. Pace*, 78 Miss., 550, 29 South., 835.

Other ferry cases are *Patterson v. Wollmann*, 5 N. D., 608, 69 N. W., 1040, 33 L. R. A., 537; *Green v. Ivey*, 183 Tenn. 8

Memphis St. Ry. Co. v. Rapid Transit Co.

45 Fla., 338, 33 South., 711; *Tugwell v. Ferry Co.*, 74 Tex., 480, 9 S. W., 120, 13 S. W., 654. All these cases sustain the views expressed in the foregoing quotations, and many other cases in which the same doctrine is recognized are collected in a note to *Bartlesville Elec. L. & Power Co. v. Bartlesville I. R. Co.*, reported in 29 L. R. A. (N. S.), 77.

We are unable to follow the effort of learned counsel for the defendants to distinguish the cases from which we have quoted from the case here presented. We think the foregoing authorities are sound and should control this controversy.

When a business may not be conducted as a matter of common right, but legislative authority is necessary, such authority, when conferred, is exclusive against all persons not endowed with like authority. Such rights, so bestowed by law, may not be infringed, except by authority of the State, and will be protected by injunction against unlawful invasion.

As a matter of course, the observation just made is only applicable to clear cases, as the case before us. If the franchise or license of a complainant was doubtful, an injunction would not be awarded to protect it, nor could the validity of a license or franchise possessed by a competing defendant be questioned, and its exercise restrained, in proceedings of this character. *Geneva-Seneca Electric Co. v. Economic Power & Const. Co.*, 136 App. Div., 219, 120 N. Y. Supp., 926; *Coffeyville Min. & Gas Co. v. Citizens' Natural Gas & Min. Co.*, 55 Kan., 173, 40 Pac., 326; *Market St. Ry. Co. v.*

Memphis St. Ry. Co. v. Rapid Transit Co.

Pen. Ry. Co., 51 Cal., 583. We are in full accord with the views expressed in these and like cases. Questions upon the regularity of a charter, the validity of a franchise, and the like, are to be determined upon suit of the attorney-general or other constituted authority, and not on suit of a competing corporation.

In the case at bar, however, defendants make no claim to any license or franchise, although such license is a statutory prerequisite to the pursuit of defendants' business. The validity of complainant's franchise, on the other hand, is not impeached.

We are referred to the case of *Levisay v. Delp*, 9 Baxt. (68 Tenn.), 415, as laying down a contrary rule. In that case a licensed ferryman, the owner of one bank of the river, sought an injunction against the unlicensed operation of a ferry in competition by the owner of the other bank of the river. Under Shannon's Code, secs. 1697, 1703, the owner of either bank of a river is entitled to keep a ferry, but "all ferry keepers are required to procure a license and execute a bond." The court refused an injunction, saying with reference to the defendant:

"It would be an idle exercise of the injunctive power by the court to restrain him in this case, when, as owner of one bank of the river, he may apply to the county court and obtain a license or order establishing his ferry, thus legalizing it at the next term of that court."

Levisay v. Delp, supra, was no doubt correctly decided on the facts appearing in that case, inasmuch

Memphis St. Ry. Co. v. Rapid Transit Co.

as the defendant there could have procured his license as a matter of right almost by the time the injunction sought would have become effective. The injunction would have accomplished little or nothing.

The injunction cannot be refused in this case on such a ground. An injunction may accomplish much here. The city of Memphis may decline to authorize the operation on its streets of jitney cars at all. At any rate, an injunction restraining the operation of such cars until the statutory bond is executed will eliminate all irresponsible owners.

In so far as *Levisay v. Delp* intimates that an injunction may not issue to protect a franchise, unless that franchise be exclusive of the right of the State to confer on others a like franchise, we are unwilling to adhere to it. We think these remarks of the learned judge delivering the opinion were obiter, and not fully considered, and they are in conflict with the great weight of authority, as we have heretofore shown. We therefore must confine the authority of the case of *Levisay v. Delp*, supra, to its own facts.

We are of opinion, moreover, that complainant is entitled to the injunction sought on another ground. As we have stated, the operation of jitneys on the streets of any incorporated city or town in Tennessee without municipal permission, when the owners have executed no bond, is absolutely unlawful. Such operation is in defiance of the statute of this State and amounts to a public nuisance.

Memphis St. Ry. Co. v. Rapid Transit Co.

“Any unauthorized obstruction of a public highway is a nuisance.” 37 Cyc., 247.

“Any unauthorized obstruction which necessarily impedes or incommodes the lawful use of a highway is a public nuisance at common law.” Elliott on Roads and Streets, sec. 644.

“All unauthorized and illegal obstructions which prevent or interfere with the free use of a street or highway as such are within the legal notion of a nuisance.” McQuillan on Municipal Corporations, sec. 925.

“An obstruction may be a nuisance, although it is not of a permanent character.” Elliott on Roads and Streets, sec. 648 (giving many illustrations).

Under the authorities quoted there can be no doubt but that the illegal operation of the swarm of jitneys described in the bill, run by irresponsible owners, racing with the street cars for patronage, and otherwise imperiling the safety of the public, in violation of law, constitutes a nuisance. The law is well settled that a public nuisance may be enjoined by a private individual, provided the latter shows special damage to himself resulting therefrom. *Weakley v. Page*, 102 Tenn., 179, 53 S. W., 551, 46 L. R. A., 552; *Richi v. Chattanooga Brewing Co.*, 105 Tenn., 651, 58 S. W., 646; *Weidner v. Friedman*, 126 Tenn., 677, 151 S. W., 56, 42 L. R. A. (N. S.), 1041; 37 Cyc., 253; High on Injunctions, sec. 816 *et seq.*

Memphis St. Ry. Co. v. Rapid Transit Co.

A frequent application of this rule is in favor of persons specially injured by nuisances on a public highway.

In *Richi v. Chattanooga Brewing Co.*, 105 Tenn., 651, 58 S. W., 646, it was held that an abutting owner was entitled to enjoin an unauthorized construction and operation by a private corporation for its own use of a private railroad along the street, which destroyed the ingress and egress of such owner to and from his premises.

Such a right of injunction is conceded to abutting owners in almost every jurisdiction, when they show special damages by reason of the obstruction of the highway: High on Injunctions, sec. 816. See cases collected in a note to *Sloss-Sheffield Steel Co. v. Johnson*, 147 Ala., 384, 41 South., 907, 8 L. R. A. (N. S.), 226, 119 Am. St. Rep., 89, as reported in 11 Ann. Cas., 285.

It is not necessary that the relief should be sought by an abutting owner, for it has been said that the character of the injury is not determined by the location of the property. The mere fact that an individual's property is at some distance from the obstruction does not determine whether or not his damage is special. *Eldert v. Long Island Elec. R. Co.*, 28 App. Div., 451, 51 N. Y. Supp., 186.

A neighboring landowner has been held to be entitled to enjoin the accumulation of an unlawful quantity of nitroglycerin on defendant's premises, where the complainant's property was so located as that he might be specially damaged by an explosion. *People's Gas Co.*

Memphis St. Ry. Co. v. Rapid Transit Co.

v. *Tyner*, 131 Ind., 277, 31 N. E., 59, 16 L. R. A., 443, 31 Am. St. Rep., 433.

The owner of a licensed ferry has been granted an injunction against the obstruction of a public road leading to his ferry. The court said:

“The obstruction of the public road leading to plaintiff’s ferry was a public nuisance and an injury to him specially; and his right to injunction against the continuance of such a nuisance is unquestionable.” *Draper v. Mackay*, 35 Ark., 497.

An injunction has also been awarded against the obstruction of a road leading to a toll bridge, at the suit of the owner of the bridge. The court was of opinion that such an obstruction, which would divert travel from the road and cause a loss of tolls to plaintiff, went to the substance and value of plaintiff’s estate as the owner of a franchise to operate the bridge. *Keystone Bridge Co. v. Summers*, 13 W. Va., 476.

So, without multiplying authorities, we conclude that on the ground last stated, as well as the former, the complainant in this case is entitled to an injunction. There can be no question but that the operation of the jitneys in the manner described in the bill, in contempt and disregard of the law of Tennessee, constitutes a public nuisance on the streets of Memphis. There is not the slightest doubt but that the complainant suffers special damage by reason of such nuisance. Complainant’s loss of revenue by reason of the illegal competition amounts, it is alleged, to several hundred dollars each day. This damage is distinct and peculiar

Memphis St. Ry. Co. v. Rapid Transit Co.

to complainant, and is an injury, to borrow the phrase of the West Virginia court, in the very substance and value of its estate.

The decree of the chancellor will be reversed. Within thirty days from this date an injunction will issue as prayed by the complainant. In the interest of the people of Memphis, who may be discommoded otherwise by the sudden removal of this means of transportation, we have thought it best to suspend the awarding of the injunction for a brief time, to permit the city of Memphis, should it so desire, to pass an enabling ordinance for the jitney owners, and to give to the latter an opportunity to comply with the terms of said ordinance and the statute of Tennessee.

Childress v. State.

JOHN CHILDRESS v. STATE.

(Knoxville. September Term, 1915.)

INFANTS. Delinquent children. Statutes. Validity.

Const., art. 1, sec. 14, declares that no person shall be put to answer any criminal charge, but by presentment, indictment, or impeachment. Laws 1911, ch. 58, establishing juvenile courts, declares that any child under sixteen who violates any law shall be deemed a delinquent child, and may be committed to the State reformatory, and that in case the child is incorrigible and incapable of reformation he shall be remanded to the proper courts for the trial of criminal offenses. *Held*, that the statute is not in violation of the constitution; the proceeding not being one penal in its nature, but merely for the protection of the delinquent child.

Acts cited and construed: Acts 1911, ch. 58.

Cases cited and approved: *Ex Parte Januszewski* (C. C.), 196 Fed., 123; *Rooks v. Tindall*, 138 Ga., 863; *Marlowe v. Commonwealth*, 142 Ky., 106; *Mill v. Brown*, 31 Utah, 473; *Lindsay v. Lindsay*, 257 Ill., 328.

Case cited and distinguished: *State ex rel. v. Kilvington*, 100 Tenn., 227.

FROM ANDERSON.

Appeal from the Juvenile Court of Anderson County.—J. H. WALLACE, Judge.

J. B. BURNETT, for appellant.

W. H. SWIGGART, JR., Assistant Attorney-General,
for the State.

Childress v. State.

MR. JUSTICE GREEN delivered the opinion of the Court.

In this case John Childress, a minor under sixteen years of age, was committed as a delinquent child to the state reformatory for a period of twelve months, after due proceedings under chapter 58, Public Acts of 1911. It appeared that he was guilty of the crime of larceny, and was properly found to be a delinquent child on a hearing before the county judge of Anderson county sitting as a juvenile court under the said statute.

The case has been brought to this court, and Childress seeks to escape the judgment below by attacking the validity of chapter 58, Public Acts of 1911. It is insisted that said act violates section 14, of art. 1 of the constitution, to the effect:

“That no person shall be put to answer any criminal charge but by presentment, indictment or impeachment.”

The statute mentioned outlines certain proceedings to be had before the juvenile courts thereby established with reference to dependent, neglected, and delinquent children, and provides for the disposition, care, education, protection, etc., of such children. Any child under the age of sixteen years who violates any law of the State is declared to be a delinquent child, and the juvenile courts are authorized to commit such a child to the State reformatory or otherwise dispose of the child as set forth in said act.

Childress v. State.

Such proceedings before a juvenile court do not amount to a trial of the child for any criminal offense. If it be found that the child has violated a law of the State, then he may be adjudged a delinquent child within the meaning of the act. The court, however, does not undertake to punish the child for the crime committed, but undertakes to remove him from bad influences and to make such disposition of the child as to eradicate evil propensities by education, wholesome training and moral instruction.

As pointed out by the court in *Ex parte Januszewski* (C. C.), 196 Fed., 123, the commission of a crime by a child may set the juvenile court in motion, but the court does not try the delinquent minor for the crime. The crime being evidence of delinquency, the court undertakes to remedy the delinquency.

Our statute provides that a child who shall have committed a misdemeanor or felony and has been adjudged to be a delinquent child, if thereafter found by the court to be incorrigible and incapable of reformation, or dangerous to the community, is then to be remanded to the proper courts for the trial of criminal offenses. So the proceedings in a juvenile court are entirely distinct from proceedings in the courts ordained to try persons for crime.

Statutes like chapter 58 of the Public Acts of 1911 have been enacted in many of the States, and have been uniformly upheld.

Childress v. State.

This court, speaking of the commitment of children to the State reformatory under a previous statute, has said:

“Such statutes are not penal, and commitment is not in the nature of punishment. Such an institution is a house of refuge, a school—not a prison. The object is the upbuilding of the inmate by industrial training, by education and instilling principles of morality and religion, and, above all, by separating them from the corrupting influences of improper associates.” *State ex rel. v. Kilvington*, 100 Tenn., 227, 45 S. W., 433, 41 L. R. A., 284.

“The commitment of infants to industrial schools, reformatories, or houses of refuge by a judge or justice without a trial is not in violation of the constitutional provisions relating to trial by jury. Such institutions are not prisons, and the proceeding is not a criminal prosecution. The object of the commitment is not punishment, but reformation and education of the infant. . . .” 24 Cyc., 147.

To the effect that these statutes do not interfere with constitutional rights to trial by jury, or immunity from trial except upon presentment or indictment, or with other constitutional rights, see *Rooks v. Tindall*, 138 Ga., 863, 76 S. E., 378; *Ex parte Januszewski* (C. C.), 196 Fed., 123; *Marlowe v. Commonwealth*, 142 Ky., 106, 133 S. W., 1137; *Mill v. Brown*, 31 Utah, 473, 88 Pac., 609; 120 Am. St. Rep., 935; *Lindsay v. Lindsay*, 257 Ill. 328, 100 N. E., 892, 45 L. R. A. (N. S.), 908, Ann.

Childress v. State.

Cas., 1914A, 1222. See, also, cases collected in notes to 45 L. R. A. (N. S.), 908, and 18 L. R. A. (N. S.), 886.

The judgment of the juvenile court is affirmed.

Baker v. Dew.

J. T. BAKER v. MRS. R. E. DEW *et al.*

(*Knoxville*. September Term, 1915.)

1. DESCENT AND DISTRIBUTION. Wife's personalty. Husband's rights. Statutes.

Laws 1913, ch. 26, entitled "To Remove Disabilities of Coverture from Married Women," and providing that they are fully emancipated from all such disabilities, and that the common-law with respect thereto and its effect, on the rights of the wife is totally abrogated, that marriage shall not impose any disability on a woman as to the ownership, acquisition, or disposition of property, and that she shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of property as if unmarried, failing expressly, or by necessary implication, to make any disposition of her property after her death, in the event of her failure to dispose of it, her personal property on her death, without such disposition, passes, *jure mariti*, to her husband, as it would had they, prior to passage of the act, made an antenuptial contract in the terms of the statute, under the law then existing. (*Post*, pp. 128-133.)

Acts cited and construed: Acts 1913, ch. 26.

Cases cited and approved: Parlow v. Turner, 132 Tenn., 339; Lillienkamp v. Rippetoe, 133 Tenn., —; Bennett *et al.* v. Hutchens *et al.*, 133 Tenn., —; Wade v. Cantrell, 38 Tenn., 346; Hollingsworth v. Mith (Miller), 37 Tenn., 472; Cox v. Scott, 68 Tenn., 305; Allen v. Walt, 56 Tenn., 242; Joiner v. Franklin, 80 Tenn., 422; Handwerker v. Diermeyer, 96 Tenn., 619; Rice v. McReynolds, 76 Tenn., 36; Sanders v. Forgasson, 62 Tenn., 249; Lane v. Farmer, 79 Tenn., 568; Jones v. Ward, 18 Tenn., 168; Hamrico v. Laird, 18 Tenn., 222; Tune v. Cooper, 36 Tenn., 296; D'Arcy v. Mutual Life Ins. Co., 108 Tenn., 567; Shugart v. Shugart, 111 Tenn., 179; Williford v. Phelan, 120 Tenn., 589; Mitchell v. Bank, 126 Tenn., 669.

Case cited and distinguished: Prewitt v. Bunch, 101 Tenn., 723; Brown's Adm'r v. Brown's Adm'r, 25 Tenn., 126.

Baker v. Dew.

2. STATUTES. Construction. Altering common-law.

A statute intended to alter the common-law will not be construed to alter it further than it expressly declares or is necessarily implied from the fact of it covering the whole subject-matter. (*Post*, pp. 133-136.)

Case cited and approved: *State v. Cooper*, 120 Tenn., 549.

FROM KNOX.

Appeal from the Chancery Court of Knox County—
WILL D. WRIGHT, Chancellor.

O. L. WHITE, S. R. MAPLES, CORNICK, FRANTZ & McCONNELL, JOUBOLMON & WELCKER and GREEN, WEBB & TATE, for appellants.

JESSE L. ROGERS, for appellee.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

Baker married Miss Clara Dew, a daughter of Mrs. R. E. Dew. The marriage occurred on November 1, 1914, and was dissolved by the death of Clara, on March 30, 1915. The bill in this case was filed by Baker on June 16, 1915, seeking a decree against Mrs. Dew and other defendants for the sum of \$1,515.40, averred to be in the hands of Mrs. Dew, as guardian of her daughter Clara. The suit is based upon the ground that the above sum of money in the hands of Mrs. Dew was, at the time of the marriage, the property of Clara, and, upon the death of Clara, became the property of

Baker v. Dew.

Baker *jure mariti*. Defendants interposed a demurrer, which the chancellor overruled but allowed an appeal which defendants perfected.

The question made by appellants is that the bill shows the marriage and death of Clara Baker to have occurred after chapter 26 of the Acts of 1913 went into effect, and therefore it is said the chancellor should have sustained the demurrer and dismissed the bill upon the ground that the act abrogated the marital rights of the husband in the personal property of the wife, and upon her death the above sum passed to her next of kin and heirs at law.

The substance of the title of the act of 1913 is "To Remove Disabilities of Coverture from Married Women," and the substance of the body of the act is:

That married women are fully emancipated from all disability on account of coverture, and the common law as to the disabilities of married women and its effect on the rights of property of the wife, is totally abrogated. Marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married. Every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of, all property, real and personal, and to make any contract in reference to it, and to bind herself

Baker v. Dew.

personally, and to sue and be sued with all the rights and incidents thereof, as if she were not married.

This act has been considered by us heretofore in three cases. *Parlow v. Turner*, 178 S. W., 766; *Sarah Lillienkamp v. W. T. Rippetoe*, and *J. G. Bennett et al. v. Jefferson Hutchens et al.* The opinions in the two cases last named were delivered at the present term. In *Parlow v. Turner*, supra, the wife was the owner of two tracts of land at the time of her marriage, which occurred prior to the passage of the act of 1913. She rented the land to a tenant by the month, the tenant paid the rent to her which accrued after the passage of the act, and upon the suit of the husband, seeking to compel the tenant to pay the same rent again, we held the tenant to be acquitted by the payment to the wife, and the result reached was based on the act of 1913. In *Lillienkamp v. Rippetoe*, supra, we held that the act did not enable a divorced woman to maintain against her former husband an action for assault and battery committed by him upon her person after the act was passed, and while they sustained towards each other the relationship of husband and wife, and in *Bennett v. Hutchens*, supra, we held that the act did not abrogate an estate held by the entirety created by deed to husband and wife antedating the passage of the statute.

Prior to the passage of the act of 1913 the law in this State upon the question of the husband's rights in the personal property of the wife was well settled. In

Baker v. Dew.

Prewitt v. Bunch, 101 Tenn. (17 Pick.), 723, 50 S. W., 748, it was said:

“Personal property in possession, and the possession of the wife in such cases is the possession of the husband, is, in law, the property of the husband; nothing else appearing to show a separate property of the wife. *Wade v. Cantrell*, 1 Head, 346; *Hollingsworth v. Mith* (Miller), 5 Sneed, 472; *Cox v. Scott* 9 Baxt., 305. The general principle of the common law is that marriage amounts to an absolute gift to the husband of all personal goods of which the wife is actually or beneficially possessed at the time, or which comes to her during coverture. *Wade v. Cantrell*, 1 Head, 346; *Allen v. Walt*, 9 Heisk., 242; *Joiner v. Franklin*, 12 Lea, 422; *Handwerker v. Diermeyer*, 96 Tenn., 619, 627, 36 S. W., 869. The common-law rule that the husband is entitled to receive and reduce to possession, during coverture, all choses in action, whether in the form of notes, debts, or legacies, belonging to the wife at the time of their marriage, or accruing afterwards, prevails in Tennessee. *Rice v. McReynolds*, 8 Lea, 36, 37. Where money of the wife is in the hands of her guardian, the latter may settle with the husband and pay him the money due. *Sanders v. Forgasson*, 3 Baxt., 249; *Lane v. Farmer*, 11 Lea, 568-572. The fact that the wife is a minor at the time of marriage makes no difference, for, upon marriage of a female ward, guardianship ceases. *Jones v. Ward*, 10 Yerg., 168. From that time the husband becomes clothed with the right to demand, receive, and sue for the distributive share

Baker v. Dew.

of his wife in her father's estate, or for any funds in the hands of the guardian. The guardian might settle with him and pay him the money due the wife. *Lane v. Farmer*, 11 Lea, 568-572. It is also well settled that if, for any reason short of abandonment of these fixed and vested rights by the husband, the wife dies before reduction to possession, the choses in action go to the husband, and whether this be as next of kin or *jure mariti* is immaterial. Williams on Exec., 242; 2 Kent Com., 137; *Hamrico v. Laird*, 10 Yerg., 222; *Tune v. Cooper*, 4 Sneed, 296."

See, also, on the same subject, *D'Arcy v. Mutual Life Ins. Co.*, 108 Tenn. (24 Pick.), 567, 69 S. W., 768; *Shugart v. Shugart*, 111 Tenn. (3 Cates), 179-183, 76 S. W., 821, 102 Am. St. Rep., 777; *Williford v. Phelan*, 120 Tenn. (12 Cates), 589-596, and authorities cited; *Mitchell v. Bank*, 126 Tenn. (18 Cates), 669, 150 S. W., 1141.

In *Prewitt v. Bunch*, supra, the equity of the wife to a settlement, who died without issue (as did the wife in the present case), was held to be no bar to the suit of the husband brought after the death of the wife, and the holding in that case was mainly put on the ground that if the husband had sued during the life of the wife, and a settlement had been decreed to her, it would only have been for the life of the wife, with remainder to the husband, she leaving no issue.

In one of our cases, speaking of the marital right of the husband, it was said:

Baker v. Dew.

“If there be a marriage contract whereby this right is abridged, it is taken away only to the extent stipulated in the settlement. When the settlement makes no disposition of the property, in the event of the wife’s death, and provides only for her dominion over it during coverture, the right of the husband as survivor is a fixed and stable right over which the court has no control, and of which he cannot be divested.”

The language of the contract in that case was:

“That the negroes and their future increase are to be and remain the property of the said Elizabeth, and subject to her control and disposal forever.”

The court admitted that the words of the contract—especially in connection with the word “forever”—were appropriate to the creation of an absolute estate in the property, but held, nevertheless, that they were used to express the quantity of the estate and the character of the dominion, which the wife was empowered to exercise over the property; the word “forever” was held to be limited by the context to a control and disposal of the property during the coverture of the wife. She did not exercise the right of disposal during her life, and it was held that the husband’s marital right which had been abridged by the contract during coverture attached to the property at her death. *Brown’s Adm’r v. Brown’s Adm’r*, 25 Tenn. (6 Humph.), 126, 127. On the other hand, in another case, the contracting husband had bound himself, his heirs, etc., “to relinquish, and does relinquish, all claims he has, or ever could have, to the property or money so purchased,

Baker v. Dew.

either in law or equity, that he might acquire by marrying or becoming the husband of the said Sarah." In commenting on the effect of this part of the contract, the court said:

"Language more strongly appropriate to exclude him from all title whatever to the property by virtue of his marital right to the property not only during coverture, but absolutely and forever, could not, we think, have been adopted, and we are unable to perceive anything in the balance of the instrument to limit the language to the period of coverture."

So here the marital right of the husband was held to be extinguished by his contract. *Hamrico v. Laird*, 18 Tenn. (10 Yerg.), 222. The principle established by these cases and others was recognized and applied in *Mitchell v. Bank*, 126 Tenn. (18 Cates), 669, 672, 150 S. W., 1141, and it was there pointed out that the creation of a separate estate in personalty, unless words were used indicating clearly an intention to cut off after coverture the husband's rights *jure mariti*, would merely have the effect to suspend them during the period of coverture, and they would attach again, at the death of the wife, to the property in which her separate estate had been created.

In the light of the law, as we have reviewed it above, we must determine what change was made by the act of 1913, so far as the rights of the parties to this suit are concerned. It is significant that neither expressly nor by necessary implication does that statute undertake to make any disposition of the prop-

Baker v. Dew.

erty of the wife after her death in the event of her failure to exercise any of the powers conferred on her by the statute. What is the necessary result? We think there can be but one, and it is the devolution of such of her property as she had not disposed of during life, according to the rule of the common law left unchanged by the act. In other words, the property passes *jure mariti* to her husband, exactly as it would have done had the husband made an antenuptial contract in the terms of the statute prior to the passage of the act under the law as it then existed. We have seen that the effect of such a contract would have been to abridge the marital rights of the husband in the personal property of the wife during coverture, and that at her death his marital rights would again attach, and the property would pass to him thereunder; so in the present case we think it must be under the statute. It cannot be material that the wife in this case was under the age of twenty-one years, at the time of marriage and during the period thereof. The law makes no exception in such a case. In opposition to the views we have expressed, the brief for appellants insists that the act totally abrogates the common law in respect of the marital rights of the husband. But there are no words of the statute which expressly so declare, and considering it as a whole we do not think such result follows by necessary implication. We think that the words "totally abrogated," in section 1 of the act, are limited by the context in which they are used, and their effect is to manifest a legislative pur-

Baker v. Dew.

pose so as to free the wife from the disabilities which the common law imposes on her as the result of marriage that she may enjoy during coverture all rights "as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married." Construed as we have held this act should be, its provisions clearly fall short of the effect of the marriage contract in *Hamrico v. Laird*, supra, and in *Loftus v. Penn*, 31 Tenn. (1 Swan), 445. Each of those contracts was held to look to a period of time beyond the coverture, and death of the wife, and to bind the husband and his representatives to refrain from setting up claim to the property of the wife *jure mariti*, when that period of time should arrive. Manifestly, the legislature knew of the existence of the marital rights of the husband in the property of the wife when it passed the act of 1913, and, if its purpose had been not only to abridge but to totally abrogate those rights, we think that purpose would have been made to appear either by the express terms of the act, or by necessary implication, considering it as an entire piece of legislation; and, as no such purpose appears, we may well assume that the body which passed the act intended to confer on the wife the power to determine by her own acts during life and coverture whether her property should, on her death, pass to her husband *jure mariti*, or to her next of kin and heirs at law, or to some other beneficiary on whom she might see fit to bestow it. Our rule for the con-

Baker v. Dew.

struction of statutes intended to alter the common law is that a statute will not be construed to alter the common law further than the act expressly declares, or than is necessarily implied from the fact that the act covers the whole subject-matter. *State v. Cooper*, 120 Tenn. (12 Cates), 549, 113 S. W., 1048, 15 Ann. Cas., 1116. This rule is well supported by the weight of authority, as may be seen by reference to the cases cited in *Sarah Lillienkamp v. W. T. Rippetoe* and *J. C. Bennett et al. v. Jefferson Hutchens et al.* We think the act of 1913 does not cover the subject of the marital rights of the husband in the personal property of the wife, after her death, where she has failed to make provision as to how it shall go on the happening of that event.

We find no error in the decree of the chancellor, and the same is therefore affirmed, at appellants' cost, and the cause is remanded for further proceedings.

City of Chattanooga v. Powell.

CITY OF CHATTANOOGA v. POWELL.*

(Knoxville. September Term, 1915.)

1. MASTER AND SERVANT. Injury to servant. Danger. Assurances of foreman. Contributory negligence.

A foreman, a man of large experience in the construction of ditches, had his attention called to the danger of working in a certain ditch about ten feet deep by a person laboring therein who had little such experience, and the foreman pronounced the ditch safe and the earth of the walls was not of such character as to give warning of imminent danger. *Held*, that the laborer was not negligent in accepting the assurances of the foreman and continuing work there. (*Post*, pp. 139, 140.)

Cases cited and approved: Mergenthaler-Horton Basket Mach. Co. v. Lyon, 28 Ky. Law Rep., 471; Central Coal & Iron Co. v. Thompson, 31 Ky. Law Rep., 276; Burkhard v. A. Leschen & Sons Rope Co., 217 Mo., 466; McKee v. Tourtellotte, 167 Mass., 69; Swearingen v. Consolidated Troup Min. Co., 212 Mo., 524; Allen v. Gilman (C. C.), 127 Fed., 609; Consolidated Coal Co. v. Shepherd, 220 Ill., 123; Baccelli v. New England Brick Co., 138 App. Div., 656.

2. MASTER AND SERVANT. Injury to servant. Foreman. Authority. Assurances of safety.

Where a foreman has authority to decide whether a ditch needs bracing, has charge of the work, and has been given directions how and when the work shall be done, and has charge of the servants, he is authorized to give to the servants assurances of the safety of the ditch which will bind his employer in a suit by a servant for personal injuries by a cave in. (*Post*, pp. 140, 141.)

FROM HAMILTON.

*The rule as to assurance of safety by master or co-servant is discussed in notes in 48 L. R. A., 542, 23 L. R. A. (N. S.), 1014, 30 L. R. A. (N. S.), 453.

City of Chattanooga v. Powell.

Appeal from the Circuit Court of Hamilton County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
NATHAN L. BACHMAN, Judge.

CARDEN & SNYDER, for plaintiff.

TATUM, THACH & LYNCH, for defendant.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

Defendant in error was one of a number of colored men engaged in digging a ditch for sewerage purposes in the city of Chattanooga, under the direction of plaintiff in error's foreman. The ditch was a long one, extending the length of a city block. The part of it where defendant in error was at work had been excavated to the depth of ten feet and eight inches. Defendant in error became apprehensive on account of the depth, and called the foreman's attention to the fact, and expressed some concern for his safety. The foreman assured him that the wall was safe, and commanded him to proceed with the work. Defendant in error continued for a time, and again became apprehensive, having observed the fall of some pebbles from the top of the wall, and a second time called upon the foreman of the plaintiff in error, and asked that the wall should be braced. The foreman replied that the wall was perfectly safe, and commanded the defendant in error to continue his work. The latter, relying on the superior knowledge of the foreman, did

City of Chattanooga v. Powell.

as he was bidden. Soon thereafter the wall caved in upon him and injured him seriously. The foreman was a man of large experience in the construction of ditches, and the defendant in error had but little experience in this work, his general occupation lying in another line of labor. The earth composing the wall of the ditch was not of such a character as to warn any one of imminent danger, since it appeared to be firm. The apprehension felt by the defendant in error was based wholly on the depth of the ditch. It was the custom of the business in which the foreman was engaged to "shore up" deep walls when he deemed them dangerous. It was on this account that the defendant in error asked that the wall extending above him be protected in the manner indicated.

The defendant in error sued the city, and recovered a judgment for \$350. The case was appealed to the court of civil appeals, and there the judgment was affirmed. The case was then brought to this court by the writ of *certiorari*.

The only question we deem necessary to consider in this opinion is whether the trial judge committed error in refusing to peremptorily instruct the jury to render a verdict in favor of the city. We are of the opinion there was no error in refusing this instruction. Defendant in error, under the facts stated, was justified in relying upon the assurance of safety given to him by the foreman, and in obeying the latter's orders to continue his work. Under these facts the city drew to itself the risk, it not appearing that the danger was so glaring that a man of ordinary prudence would not have

City of Chattanooga v. Powell.

continued to work. This principle is well settled. *Mergenthaler-Horton Basket Mach. Co. v. Lyon*, 28 Ky. Law Rep., 471, 89 S. W., 522; *Central Coal & Iron Co. v. Thompson*, 31 Ky. Law Rep., 276, 102 S. W., 272; *Burkard v. A. Leschen & Sons Rope Co.*, 217 Mo., 466, 117 S. W., 35; *McKee v. Tourtellotte*, 167 Mass., 69, 44 N. E. 1071, 48 L. R. A., 542; *Swearingen v. Consolidated Troup Min. Co.*, 212 Mo., 524, 111 S. W., 545; *Allen v. Gilman* (C. C.), 127 Fed., 609; *Consolidated Coal Co. v. Shepherd*, 220 Ill., 123, 77 N. E., 133; *Baccelli v. New England Brick Co.*, 138 App. Div., 656, 122 N. Y. Supp., 856.

The exception just noted as to glaring dangers is a sufficient protection to the master. The latter should not be permitted in other cases to say that the servant assumed the risk in the face of an assurance of safety and a command to proceed. The assurance, in such a case, is equivalent to a statement to the servant that the master has a knowledge of the matter superior to that of the servant, and that the latter can rely upon the information given. To permit the master, under such circumstances, to throw the responsibility on the servant would be equivalent to conferring on him the right to practice a fraud. It would be tantamount to permitting him to say to the servant:

“You should not have trusted me. I invited your confidence, but you should have known it was misplaced.”

No court should sanction such treachery.

It is insisted, however, that the foreman had no authority to give the assurance. It was his duty to

City of Chattanooga v. Powell.

decide when the wall needed bracing; hence to judge of the danger. He was in the position of the master; he had charge of the work, and was giving directions as to how it should be done, and when it should be done. It was within his line of duty to control the servants, and it necessarily followed that he had the right to make such assurances in good faith, in order to secure a continuance of the work, and these would be binding on the master in the absence of knowledge on the part of the servant of an express withholding of the power.

We are referred to the case of *Brown v. Electric Co.*, 101 Tenn., 252, 47 S. W., 415, 70 Am. St. Rep., 666.

That case is not in point. The nature of the earth, as described in the opinion of the court, was such as to furnish a direct warning to the servant of the imminence of his danger. It was made earth—

“principally filled in with cinders, which was loose stuff, and the person who was digging could tell this better than any one else.”

It appears that the servant knew the danger he was incurring, yet made no complaint, nor did he receive any assurance of safety, if indeed such assurance would have amounted to anything under the facts of that case.

Let the judgment of the court of civil appeals be affirmed.

Edwards v. Fruit Products Co.

R. J. EDWARDS v. HAMBLY FRUIT PRODUCTS Co. *et al.*

(Knoxville. September Term, 1915.)

BILLS AND NOTES. Defenses available against innocent holders.

Under Negotiable Instruments Law (Acts 1899, ch. 94) sec. 60, providing that the maker of a negotiable instrument, by making it, engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse, the innocent holder of a negotiable note may recover thereon, though the payee was a foreign corporation, which, though required to do so, had not complied with the law in respect to filing a copy of its charter of incorporation.

Acts cited and construed: Acts 1899, ch. 94.

Cases cited and approved: *Orr's Administrator v. Orr*, 157 Ky., 570; *First Nat. Bank of Massillon v. Coughron* (Ch. App.), 52 S. W., 1112; *Young v. Gaus*, 134 Mo. App., 166; *Nat. Bank of Commerce v. Pick*, 13 N. D., 74; *Halsey v. Henry Jewett Co.*, 190 N. Y., 231.

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.—T. M. McCONNELL, Chancellor.

STRANG & FLETCHER, for appellants.

THOMPSON, WILLIAMS & THOMPSON, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

One who shows himself to be the innocent holder of a note negotiable in form may recover thereon, notwithstanding the fact that the note was executed in

Edwards v. Fruit Products Co.

this State to a payee that was a foreign corporation, which had not, though required to do so, complied with the laws of this State in respect of the filing here of a copy of its charter of incorporation.

Whatever may be the rule as to the maintenance of suit by such corporate payee itself (*Orr's Administrator v. Orr*, 157 Ky., 570, 163 S. W., 757), or whatever may have been the rule as to the right of an innocent holder in that regard before the passage of our Negotiable Instruments Law (Acts 1899, ch. 94), as to which see *First National Bank of Massillon v. Coughron* (Ch. App.), 52 S. W., 1112, we think it manifest that, since the passage of that law, a recovery will be awarded to one into whose hands, as an innocent holder, such a note comes. Section 60 of that act governs, in its stipulation as follows:

“The maker of a negotiable instrument, by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.”

This statutory provision has been so construed by the courts of several jurisdictions. *Young v. Gaus*, 134 Mo. App., 166, 113 S. W., 735; *National Bank of Commerce v. Pick*, 13 N. D., 74, 99 N. E., 63; Brannan. Neg. Inst. Law, sec. 60. And see *Halsey v. Henry Jewett Co.*, 190 N. Y., 231, 83 N. E., 25, 123 Am. St. Rep., 546.

This, if we were to treat the execution of the note to the corporate payee to have been a part of a doing

Edwards v. Fruit Products Co.

of business in this State on its part, so as to fall within the purview of our foreign corporation acts.

Decree of the court of civil appeals, in not holding the indorsee an innocent holder, is reversed, and the bill of complainant of Edwards, the maker of the note, seeking to cancel the note, is dismissed.

Meek v. Trotter.

FLORENCE MEEK *et al.* v. GEORGE M. TROTTER *et al.*

(*Knoxville*. September Term, 1915.)

1. WILLS. Construction. Substitution. Death without issue.

Though, where there is an immediate gift to a person with a gift over in case of his death without issue, a death without issue during the life of the testator is contemplated, the rule does not apply to a limitation over after a devise in remainder. (*Post*, pp. 150-152.)

Cases cited and approved: Vaughan v. Cator, 85 Tenn., 302; Meacham v. Graham, 98 Tenn., 190; Katzenberger v. Weaver, 110 Tenn., 620; Frank v. Frank, 120 Tenn., 569; Wilson v. Hays, 109 Ky., 321; McCormick v. McElligott, 127 Pa., 230; Mayer v. Walker, 214 Pa., 440; Sumpter v. Carter, 115 Ga., 823.

Case cited and distinguished: Cook v. Collier (Ch. App.), 62 S. W., 658.

2. WILLS. Provisions for surviving wife. Operation and effect of election.

Where a widow, given a life estate in real property by the will of her husband, dissented from the will, the estates in remainder were thereby accelerated so that the remaindermen became entitled to the immediate possession and beneficial use of such of the property devised to the widow for life and to them in remainder, as was not assigned to the widow as dower; the legal effect of the dissent as regarded the widow's life estate being the same as if she had died. (*Post*, pp. 152, 153.)

Cases cited and approved: Armstrong v. Park's Devisees, 28 Tenn., 195; Latta v. Brown, 96 Tenn., 343.

3. WILLS. Provisions for surviving wife. Operation and effect of election.

A testator gave a life estate in certain real estate to his wife, and provided that after her death certain parts of such real estate should go to his daughters D. and F., a granddaughter and a grandson; it being further provided that upon the death of the granddaughter, or the daughter F. without issue, the

133 Tenn. 10

Meek v. Trotter.

property given them should vest in the daughter D. and her bodily heirs. After certain money legacies, the will gave all other moneys, notes, bonds, and chattels to the children of D. The widow dissented from the will and her dower was laid off in amounts not proportioned to the several estates in remainder, a larger part of the property given to F. being taken than of the property given to the other remaindermen, while the child's portion and the year's support allotted to the widow were taken out of property that would otherwise have passed under the legacy to the children of D. *Held*, that F. was entitled to contribution from the other remaindermen to equalize the inequality due to the assignment to the widow of a disproportionate part of the real estate devised to her in remainder. (*Post*, pp. 153, 154.)

Case cited and approved: Pittman v. Pittman, 27 L. R. A. (N. S.) 605.

4. WILLS. Provisions for surviving wife. Operation and effect of election.

D.'s children, even assuming that the legacy to them was a residuary legacy, were entitled to have the realty turned back by the widow's renunciation sequestered during the life of the widow for their indemnity, as assuming that residuary legatees are not entitled to such relief, unless the will shows that they were preferred objects of the testator's bounty, the gifts over after the death of F. and the granddaughter without issue, showed that they were the peculiarly preferred objects of the testator's bounty. (*Post*, pp. 154-158.)

Cases cited and approved: Darden v. Hatcher, 41 Tenn., 513; Sandoe's Appeal, 65 Pa., 314; Batione's Estate, 136 Pa., 317; McReynolds v. Counts, 9 Grat. (Va.), 242; Firth v. Denny, 2 Allen (Mass.), 468; Hinkley v. House of Refuge, 40 Md., 461; Estate of Vance, 141 Pa., 201.

Case cited and distinguished: Jones v. Knappen, 63 Vt., 391.

5. WILLS. Provisions for surviving wife. Operation and effect of election.

The payments to F. by the other remaindermen should be continued only during the widow's life, and not throughout F.'s life. (*Post*, p. 158.)

Meek v. Trotter.

FROM KNOX.

Appeal from the Chancery Court of Knox County.—
R. H. SANSOM, Special Chancellor.

GREEN, WEBB & TATE, for complainants.

JAS. G. JOHNSON, guardian *ad litem* for Agnes Henritze.

SHIELDS & CATTS, for defendants.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

Joseph Meek died in Knox county possessed of a personal estate of value about \$25,000, and a large amount of real estate, consisting of above thirty improved lots and parcels of realty in the city of Knoxville. He left two daughters, Florence, a single woman about thirty-five years of age; Dona, the wife of George M. Trotter and the mother of several minor children; and also a granddaughter, Agnes Henritze, the latter being the only child of a deceased daughter of the testator.

The deceased left a will, disposing of nearly all of his realty, the items of which involved in this litigation are as follows:

“Third, I will and bequeath to my wife, Julia Allen Meek, all of my other real estate to have and to hold during her natural life, provided that she shall collect the rent, and shall pay all taxes and keep the said

Meek v. Trotter.

property in good repair during her life. Provided, further, that she shall, after paying all taxes and for all necessary repairs, retain for herself out of the rents of said property, such sums of money as she may deem necessary to keep her in comfort during her life and hold the balance of her collections together with the interest thereon in trust for the use and benefit of the children of Dona Trotter, and at the death of said Julia Allen Meek, all of said money so accumulated out of the rent, together with the interest thereon, shall be divided equally among the children of said Dona Trotter. Provided, further, that this bequest is made to said Julia Allen Meek, my wife, in lieu of all her legal rights in my estate, both real and personal.

“Fourth. At the death of my wife, Julia Allen Meek, I will and bequeath to my daughter, Dona Trotter, the following real estate: (Here describing it.) And it is further provided that all of these bequests to my daughter, Dona Trotter, are to her and her bodily heirs, free from any right or interest in her husband.

“Fifth. At the death of my wife Julia Allen Meek, I will and bequeath to my daughter, Florence Meek, the following real estate: (Here describing nine parcels), provided that if the said Florence Meek dies without bodily heirs the remainder interest in said property shall at her death vest in my daughter Dona Trotter and her bodily heirs, free from any rights or interest of her husband.

“Sixth. At the death of my wife, Julia Allen Meek, I will and bequeath to my granddaughter: Agnes

Meek v. Trotter.

Henritze, the following real estate: (Here describing it), provided however, that if the said Agnes Henritze shall have bodily heirs, the said property shall become vested in her fee, and in event that she die without bodily heirs, the remainder at her death shall vest in my daughter Dona Trotter, and her bodily heirs, free from any right or interest of her husband.

“Seventh. At the death of my wife, Julia Allen Meek, I will and bequeath to my grandson, Joe Meek Trotter, two houses and lots at the junction of Church and Main avenues in fee, house numbers 1118 and 1115.

“Eighth. I will and bequeath to my daughter, Florence Meek, one thousand dollars in cash.

“Ninth. I will and bequeath to my granddaughter, Agnes Henritze, one thousand dollars in cash.

“Tenth. I direct that the inheritance tax be paid out of any other moneys I may have on hand at the time of my death.

“Eleventh. All other moneys, notes, bonds and chattels that I may have at the time of my death, shall be divided equally among the children of my daughter Dona Trotter.

“Twelfth. I make, constitute, and appoint my wife, Julia Allen Meek, executrix of this my last will and testament, consisting of four typewritten pages.”

Mrs. Julia Allen Meek declined to qualify as executrix and, pursuing the statutory course, dissented from the will. Commissioners were appointed, who laid off homestead, dower, a child's portion, and a year's allowance to her as widow, and in so doing assigned to her

Meek v. Trotter.

disproportionate parts of the lots devised to the remaindermen at the death of testator's wife; for example, seven out of the nine parcels devised to Florence Meek were so assigned; two out of seventeen devised to Dona Trotter and none of those devised to Agnes Henritze. This has given rise to one of the chief disputes in this cause. The bill of complaint was filed by Florence Meek to have the will construed and the rights of those in interest decreed, in the light of the changes wrought by the dissent and of the consequent dower allotment and the setting aside to the dissenting widow of a child's portion of one-fourth of the personalty, etc. This child's portion and the year's support were taken out of the property that would otherwise have passed under the eleventh clause of the will to the minor children of Dona Trotter.

The chancellor and the court of civil appeals held that the devisees in remainder should be equalized, and that to that end Florence Meek should be paid stated sums each month during her life by Dona Trotter and Agnes Henritze, ascertained by a reference to the rental values of the properties so devised to them, respectively, and not assigned to the renouncing widow.

Several of the points determined by the lower courts in their decrees are not treated of in this opinion, but are disposed of orally and in a "memorandum for decree" handed down herewith.

The first question for treatment in this opinion is in respect to the fifth and sixth clauses of the will wherein realty is given in remainder to the daughter, Florence Meek, and to the granddaughter, Agnes Henritze, re-

Meek v. Trotter.

spectively, after the death of the wife, with provisos that if they die "without bodily heirs the remainder interest in said property shall at her death vest in my daughter, Dona Trotter, and her bodily heirs."

It is the contention of Florence and Agnes that the limitation over in favor of Mrs. Trotter and children should only take effect in case of the death of Florence and Agnes without issue before the testator's death, and that as the event proved the testator died before Florence and Agnes; and that therefore the estates of the latter then became absolute. The cases of *Vaughan v. Cator*, 85 Tenn., 302, 2 S. W., 262; *Meacham v. Graham*, 98 Tenn., 190, 39 S. W. 12; *Katzenberger v. Weaver*, 110 Tenn., 620, 75 S. W., 937; *Frank v. Frank*, 120 Tenn., 569, 111 S. W., 1119, are relied upon to sustain the contention, in that they hold that the words "die without issue" contemplate the death of the devisee without issue surviving during the life of the testator. This contention, however, fails to take note of the distinguishing fact that those cases dealt with immediate devisees or gifts to the one declared to be, under the rule, vested with title absolute. The rule is expressed in 3 Jarman, Wills, 605-661, as follows:

"If there is an immediate gift to A. and a gift over in case of his death, or any similar expression implying death to be a contingent event, the gift over will take effect only in event of A.'s death before the testator's."

In the case at bar the gift is limited to take effect after a life estate, vested in the wife of the testator, and it has been quite generally held that the rule of the above cases is not applicable to such devisee in re-

Meek v. Trotter.

mainder. *Wilson v. Hays*, 109 Ky., 321, 58 S. W., 773; *McCormick v. McElligott*, 127 Pa., 230, 17 Atl., 896, 14 Am. St. Rep., 837; *Mayer v. Walker*, 214 Pa., 440, 63 Atl., 1011; *Sumpter v. Carter*, 115 Ga., 893, 42 S. E., 324, 60 L. R. A., 274.

The point has also been so ruled in this State. In the case of *Cook v. Collier* (Ch. App.), 62 S. W., 658, affirmed by this court, touching this point, it was said in an opinion which was prepared by the present chief justice:

“The rule administered in *Vaughan v. Cator* and *Mecham v. Graham* does not apply here, because it expressly appears in the present case that the limitations over were to take effect on the termination of a life estate. Where the limitation over is made to rest on the termination of a life estate, the rule invoked has no application. 1 Underhill, Wills, 348. In this authority it is said: ‘If the devise to the primary devisee, upon whose death without issue the devise over is to take effect, is for life in express terms, or if upon the whole will it is apparent that the testator did not intend that he should in any event take the absolute interest, death without issue will not be confined to a death during the lifetime of the testator, but a death at any time without issue will suffice to bring the devise over into effect.’ ”

It is not controverted that when the widow dissented and elected to take under the law and not under the will, the estates limited in remainder to Florence Meek, Dona Trotter, Agnes Henritze, and Joseph M. Trotter were accelerated, so that these devisees became

Meek v. Trotter.

entitled, nothing else appearing, to the immediate possession and beneficial use of such of the property devised to the widow for life and to them in remainder as was not assigned to the widow as dower. The legal effect of the dissent was the same as regards the widow's life estate as if she had died. *Armstrong v. Park's Devisees*, 9 Humph. (28 Tenn.), 195; *Latta v. Brown*, 96 Tenn., 343, 34 S. W., 417, 31 L. R. A., 840, and cases there cited.

The decisions elsewhere, also, appear to be uniform to the effect that a renunciation by a widow of a life interest given her by the will is equivalent to its termination by her death so far as the vesting in possession of the remainder, by way of acceleration, is concerned.

Counsel are disagreed on the question that arises out of the failure of the commissioners to lay off dower in amounts proportioned to the several estates in remainder thus accelerated as to vestiture. We are of opinion that the court of civil appeals decreed properly on this matter, to the effect that Florence Meek is entitled to equal benefits with her sister and niece, in the sense of having the inequality due to the assignment of seven out of nine of the parcels of realty devised to her remedied, except that the minor Joseph M. Trotter should have been included as the taker of an accelerated devise. The right to be accelerated in such case is subject to the right to have equalization made by way of contribution from others in the class with Florence Meek. *Latta v. Brown*, supra; note to *Pittman v. Pittman*, 27 L. R. A. (N. S.), 605. Such

Meek v. Trotter.

waiver or dissent by the widow blots out all the provisions of the will for the widow, and leaves the remaining provisions of the will in force, to be accommodated equitably to the state of the testator's property as left by such action. The will is to be enforced notwithstanding, as nearly in accordance with the scheme devised by the testator as it can be.

It should not be in the power of a widow to exercise the functions of making another will for the testator by shifting either the benefits or the burdens at her discretion through the medium of her dissent, as for example taking for dower seven out of nine parcels from one devisee, and only two out of fifteen devised to another. The inequality due to the widow's appeal to the law's provisions are subject to be remedied by equity.

A closer question arises on the assignment of errors by the Trotter minor children in which they complain that the child's share and year's support allotted to the dissenting widow were taken from the legacy to them, given by clause eleven of the will, and that relief over because thereof was denied them.

The court of civil appeals treated clause eleven as a residuary clause, and argued that on that account the minors could have no relief, likening the case to that of the payment of debts out of a residuary fund, with result that the residuary legatees have no right to call upon special or general legatees to contribute, *Darden v. Hatcher*, 1 Cold. (41 Tenn.), 513.

It is true that the residuary personal estate must first bear the burden of the debts of the decedent,

Meek v. Trotter.

and that the residuary legatees can take nothing until all debts and also, ordinarily, until all prior dispositions have been satisfied. Consequently, though of course the residuary legatees contribute *inter sese*, they cannot call upon other legatees to contribute or abate with them, whether these legatees be specific, demonstrative, or merely general, although the residuary personalty is wholly exhausted.

But if we assume, without deciding, that the eleventh clause creates a mere residuary legacy, is the decree complained of sustainable on equitable principles? The specific legacies to Florence Meek and Agnes Heritze in clauses 8 and 9 are not impaired, nor is there any effort on the part of the minors to resort to same for contribution. What they do ask is that what the widow renounced and turned back when she dissented be sequestered for their indemnity as disappointed legatees. They are the only ones who do suffer disappointment. The devisees in remainder of realty would be wholly benefited if they be let in to an earlier enjoyment of the property (postponed as they were by the will for the life of the wife of testator) by reason of her dissent terminating the life estate. May they take this great benefit outright and to the detriment of the minors?

The rule of equity is to treat the substituted devise or bequest to the wife as a trust in her for the benefit of the disappointed claimants; and the court will assume jurisdiction to sequester the benefit intended for the refusing wife, in order to secure compensation to those whom her election disappoints. *Sandoe's*

Meek v. Trotter.

Appeal, 65 Pa., 314; *Batione's Estate*, 136 Pa., 317, 20 Atl., 572; *McReynolds v. Counts*, 9 Grat. (Va.), 242.

The renounced benefit may be conceived of as intercepted in devolution and sequestered as the property of the widow for such indemnity. Therefore, even if the minors be deemed residuary legatees they would not in this case in legal contemplation resort for indemnification to any estate belonging to Florence Meek and the other devisees. The tolling or charge by equity in behalf of the minors would be a condition of their taking charge of the accelerated remainder interests.

The right of residuary legatees to such indemnity was recognized and enforced in *Firth v. Denny*, 2 Allen (Mass.), 468; *Hinkley v. House of Refuge*, 40 Md., 461, 17 Am. Rep., 617.

Woerner, in his work on Administration, says on this subject:

“The rejection by the widow of the provisions made for her by the will generally results in the diminution or contravention of devises and legacies to other parties. The rule in such case is that the devise or legacy which the widow rejects is to be applied in compensation of those whom her election disappoints.”

In the case of *Jones v. Knappen*, 63 Vt., 391, 22 Atl., 630, 14 L. R. A., 293, there were involved the rights of such residuary legatees. The court, declaring the true doctrine, said: .

“The controlling, and, we think the more reasonable principle, announced in most of these cases, is the one expressed by *Woerner*, *supra*, *viz.*, to use the renounced devises and legacies given by the will to the

Meek v. Trotter.

widow, to compensate so far as may be, the devises and legacies diminished by such renunciation. When the remaindermen are affected *pro rata* by such renunciation, acceleration of the enjoyment of their devises or legacies, diminished proportionately, will equitably compensate them, so far as possible for such diminution. But in this case acceleration of enjoyment would increase the specific pecuniary legacies, to the detriment of the residuary legatees, whose shares only are diminished by the renunciation. Applying the principle stated, the life use of the property given by the will to the widow, and renounced by her, should be used to compensate the residuary legatees, the next of kin of the testator and of his wife. This may be accomplished by allowing that portion of the estate, not taken by the widow, to accumulate during her natural life."

It is not unusual for a testator to provide for the preferred object of his bounty by means of a residuary clause in his will. That this is true is recognized in a case contrary to those above cited—*Estate of Vance*, 141 Pa., 201, 21 Atl., 643, 12 L. R. A., 227, 23 Am. St. Rep., 267. It is there held that the residuary estate must bear the whole loss incident to a dissent "unless there is a plain intention in the will that the residuary legatee is the preferred object of testator's bounty." It is submitted that this places the rule on an illusory and unsatisfactory basis. But if it were a true test, the minor legatees meet it in the case at bar, since it is manifest from the will that they were the peculiarly preferred objects of the testator's

Meek v. Trotter.

bounty, as witness the remainders limited in their favor in the fifth and sixth clauses of the will.

We therefore are of opinion that the realty turned back on renunciation by the widow should have been sequestered by the court below so that the net proceeds therefrom during the life of the widow should be first applied to such indemnity of the minor legatees; and that thereafter the beneficial enjoyment be with the devisees whose estates were accelerated by the dissent, they to be equalized *inter sese* as above indicated. The payment of sums from Dona and Agnes to Florence to that end will be commenced at the date they begin to receive the proceeds and be continued for the balance of the widow's life—not throughout the life of Florence, as was decreed by the lower courts.

Except as herein modified the decree of the Court of Civil Appeals is affirmed, with remand to the lower court. Costs of the appeal will be paid by the three devisees in remainder, one-half by Florence Meek and one-fourth by each of the others.

Jones *et al.* v. Coal Creek Mining & Mfg. Co.

WILLIAM AND RICHARD EDWARD JONES *et al.* v. COAL
CREEK MINING & MANUFACTURING Co. *et al.*

(*Knoxville*. September Term, 1915).

1. LIMITATION OF ACTIONS. Disabilities. Nonresidence.
Removal of disabilities. Effect.

Under Shannon's Code, sec. 4448, providing that persons beyond the limits of the United States and the territories thereof when the cause of action accrued shall be excepted from the operation of the statute of limitations, nonresident plaintiffs cannot maintain their action based upon a cumulative disability, but can rely only upon their own disability, and not upon a disability of their ancestor in interest upon whose death primary disability ceased. (*Post*, pp. 165-167.)

Cases cited and approved: *Gulon v. Anderson*, 27 Tenn., 298; *Weisinger v. Murphy*, 39 Tenn., 675; *Patton v. Dixon*, 105 Tenn., 97.

Code cited and construed: Sec. 4448 (S.).

2. LIMITATION OF ACTIONS. Disabilities. Nonresidence.
Exceptions.

Under Shannon's Code, sec. 4448, providing that persons beyond the limits of the United States and the territories thereof when the cause of action accrued shall be excepted from the operation of the statute of limitations, no change of citizenship for removal of the disability is required; but if the persons excepted by the statute at any time come within the limits of the United States or its territories, they are no longer protected by the statute. (*Post*, pp. 167, 168.)

Case cited and approved: *Bond v. Jay*, 7 Cranch., 350.

3. LIMITATION OF ACTIONS. Exceptions. Burden of proof.

While the burden of proof is on the party asserting the bar of the statute of limitations to show that his opponent is barred, when such showing is made, then the burden shifts to the

Jones et al. v. Coal Creek Mining & Mfg. Co.

other party to show that he has been at all times within an exception of the statute. (*Post*, pp. 168, 169.)

Cases cited and approved: *Sou. Coal & Iron Co. v. Schwoun*, 124 Tenn., 176; *Shropshire v. Shropshire*, 15 Tenn., 167; *Apperson v. Pattison*, 79 Tenn., 484; *Alvis v. Oglesby*, 87 Tenn., 182.

4. LIMITATION OF ACTIONS. Nonresidence of plaintiff. Evidence.

In an action in which the two plaintiff trustees relied on the exception of absence from the country to save their cause of action from the statute of limitations, evidence *held* not to show that their several visits to the United States were never concurrent, so that they failed to bring themselves within the exception of the statute. (*Post*, pp. 169, 170.)

5. LIMITATION OF ACTIONS. Exceptions. Repeal of excepting statutes. Effect. Validity.

Acts 1901, ch. 15, abolishing all exceptions of statutes limiting commencements of suits and actions in favor of persons beyond the limits of the United States and the territories thereof, removes the exception of Shannon's Code, sec. 4448, providing that persons beyond the limits of the United States and the territories thereof when the cause of action accrued shall be excepted from the operation of the statute of limitations, and is valid, since it does not cut off all rights of action immediately, but gives to persons formerly under disability the full period of the statute of limitations after the removal of the disability in which to bring action. (*Post*, pp. 170-173.)

Acts cited and construed: Acts 1901, ch. 15.

Cases cited and approved: *McGahey v. State of Virginia et al.*, 135 U. S., 662; *Lewis v. Lewis*, 7 How. (U. S.), 776.

Case cited and distinguished: *Slover v. Union Bank*, 115 Tenn., 347.

6. CONSTITUTIONAL LAW. Statutes. Construction in favor of validity.

A statute destroying the exceptions to the statute of limitations will be so construed that it may be held constitutional, if this

Jones et al. v. Coal Creek Mining & Mfg. Co.

can be done reasonably, in order to preserve the validity of the statute. (*Post*, pp. 173, 174.)

7. CONSTITUTIONAL LAW. Limitation of actions. Obligation of contracts. Change of statute.

The statute of limitations does not impair the obligation of contracts, but takes away the remedy only, and so may affect the remedy on contracts or rights made or acquired before, as well as those made after, its passage, provided that as to contracts made before its passage it must give the parties a reasonable time in which to sue. (*Post*, pp. 174, 175.)

8. LIMITATION OF ACTIONS. Time of bringing suit. Effect.

Where plaintiffs were under the disability of nonresidence, and therefore not subject to the statute of limitations, and their exception was removed by statute, within two years of which time they brought their action, their cause is saved, so as to prevent subsequent acquisition of title by adverse possession against them, in spite of the fact that it is subsequently dismissed, when a new action is brought within one year from such dismissal. (*Post*, pp. 175, 176.)

9. EJECTMENT. Actions. Pleadings. Sufficiency.

Pleadings in ejectment were sufficient, where title was averred upon one hand and denied upon the other, regardless of failure to plead details. (*Post*, pp. 176-178.)

Acts cited and construed: Acts 1819, ch. 28; Acts 1851-52, ch. 152.

Cases cited and distinguished: *Coal & Iron Co. v. Schwoon*, 124 Tenn., 176; *Drewery et al. v. Nelms*, 132 Tenn., 254; *Graham's Heirs v. Nelson*, 24 Tenn., 605; *Gross v. Disney*, 95 Tenn., 592.

Code cited and construed: Secs. 4970, 4980 (S.).

10. ADVERSE POSSESSION. Color of title. Deeds. Sufficiency.

The deeds relied upon by the defendants as color of title to property in question in ejectment were sufficient to show color of title, since when considered with prior grants they pur-
133 Tenn. 11

Jones *et al.* v. Coal Creek Mining & Mfg. Co.

ported to convey a fee, though in fact, the deeds in question were but quitclaim deeds. (*Post*, pp. 178-181.)

Cases cited and distinguished: Briar Hill Collieries v. Gernt, 131 Tenn., 542; Coal & Iron Co. v. Schwoon, 124 Tenn., 176.

11. ADVERSE POSSESSION. Possession of portion of tract. Effect.

Where one seeking to establish title by adverse possession shows possession of a portion of the tract under color of title, his possession extends constructively to the whole tract. (*Post*, pp. 181, 182.)

FROM ANDERSON.

Appeal from the Chancery Court of Anderson County.—HUGH G. KYLE, Chancellor.

LUCKY & ANDREWS and SAWYER & UNDERWOOD, for appellants.

SCOTT & CHANDLER and WRIGHT & JONES, for appellees.

MR. JUSTICE FANCHER delivered the opinion of the Court.

This bill was filed October 5, 1910, by the complainants, who are citizens and residents of Great Britain, against the Coal Creek Mining & Manufacturing Company and the Poplar Creek Coal & Iron Company, Tennessee corporations, and is an action of ejectment for the purpose of recovering 5,000 acres of land in Anderson county originally granted by the State to Samuel C. Young by grant No. 22,382, issued February

9, 1839. Complainants deraign title from the grant by regular chain of conveyances and muniments of title. They hold as trustees under the will of Samuel Roberts, dated September 27, 1884, and who died September 25, 1885. He purchased February 4, 1856. The defendants claim title through three inferior grants, and rely upon the statute of limitations to perfect their title.

The Coal Creek Mining & Manufacturing Company claims and deraigns title to grant No. 40,475, issued to Wiley & McEwen December 19, 1873. This grant interlaps on the Samuel C. Young grant partly, covering a few hundred acres of the Young tract. The Coal Creek Company also claims a 200-acre tract which was granted to Alex Galbreath by grant No. 23,134, issued November 5, 1839. The record shows an agreement between the parties that it acquired whatever title there may be to this grant by regular conveyances.

The Poplar Creek Coal & Iron Company claims and deraigns title to grant No. 26,058 to William Bailey, issued January 29, 1848, and this tract covers all of the Young grant, except that which is covered by the Wiley and McEwen grant, except a small piece of about ten acres on the extreme east of that tract.

The Alex Galbreath grant claimed by the Coal Creek Company lies almost wholly within the William Bailey grant claimed by the Poplar Creek Coal Company, and only about one-third of this Galbreath tract lies within complainants' boundary.

It is conceded upon the record that defendant Coal Creek Company has had actual and continuous pos-

Jones *et al.* v. Coal Creek Mining & Mfg. Co.

session for a number of years within complainants' boundary and on the interlap with the Wiley and McEwen grant, but the exact date when this possession began is in some doubt. The first definite time established in the record of the beginning of this adverse holding is about December 10, 1888, when a lease on the Wiley and McEwen tract of land was executed by the Wiley Coal Company and the Coal Creek Mining & Manufacturing Company jointly to one Jerry Bunch, who thereupon moved upon the land, and from about that date a continuous possession is shown by actual inclosures erected by Jerry Bunch and kept up continuously by him and other tenants of defendant to the present time. His inclosures amounted to about twenty-five acres. One John Bunch also held possession of inclosures of about twelve to fifteen acres within complainants' boundary. These inclosures were situated partly within the William Bailey tract and partly within the Wiley and McEwen tract; the common line dividing those two tracts passing through his (John Bunch's) inclosures. He stated that he went upon the land and held possession under a lease from Hornsby, a grantor of defendant, and later by agreement with Cox, who was a joint agent of the two defendants, and while he stated that he commenced to hold possession about 1884, he shows that he lived there about two years before Jerry Bunch made his inclosures, and he also shows that a part of the time he held for one Byrd, who claimed the land. He said that about fifteen years ago Byrd bluffed him into taking a lease from him, and that he held for Byrd for

Jones et al. v. Coal Creek Mining & Mfg. Co.

two years, until the lawsuit was settled between Byrd and the defendants. In another statement he said that he began his clearing in 1889, and that he commenced first under Byrd, and that after the suit was settled he took the first lease under the Coal Creek Company. Since Cox has been agent, he has held for both the Coal Creek Company and the Poplar Creek Company, presumably holding on one side the line for one and on the other side for the other. Cox has been joint agent for these companies since 1897.

So we are unable to determine that the defendant Coal Creek Company's possession began before the latter part of 1888, or the first part of 1889, and during the first part of this holding it appears that there has been some adverse claim and possession of Byrd. It is not sufficiently clear that there was seven years' exclusive possession by the Coal Creek Company before John Bunch held for Byrd, and it is not satisfactorily proven that the exclusive possession for the Coal Creek Company since the settlement of the suit with Byrd has been more than fifteen years. The Poplar Creek Company and its predecessors in title have been in actual possession of the William Bailey tract and within complainants' boundary by actual inclosures from March, 1884, and this has probably been continuous to the present time.

Complainants contend that they are not affected by this adverse possession, because William and Richard Edward Jones and Samuel Roberts, under whom they claim, have been residents and citizens of Great Britain during all the time that possession has been held

Jones *et al.* v. Coal Creek Mining & Mfg. Co.

by defendants, and that they fall within that provision of our statute which excepts from the operation of the limitation persons "beyond the limits of the United States and the territories thereof," and providing that:

"Such persons, or their representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceeds three years, and in that case within three years from the removal of such disability." Shannon's Code, section 4448.

The bill avers that Samuel Roberts was a citizen and resident of Wales, Great Britain, and a nonresident of the State of Tennessee, except for a short period just before the Civil War, and that he remained in the State of Tennessee or within the United States until about the year 1868. Richard Edward Jones testified that Samuel Roberts was throughout his whole life a citizen of Great Britain, and never returned to the United States after the year 1870. Richard Edward Jones and his co-complainant, William Jones, are citizens and residents of Great Britain, but have both visited in this country. Richard Edward Jones stated that William Jones has lived at Sutton Lodge, Shrewsbury, in the county of Salop, in England, continuously since the year 1880, and that he, Richard Edward Jones, has lived at Oakley Grange, Shrewsbury, in the county of Salop, in England, continuously since the year 1902. He stated that he was in the United States of America upon several occasions between the years

Jones *et al.* v. Coal Creek Mining & Mfg. Co.

1884 and 1892, but has not been in this country since 1892. He was paying visits in various places entirely upon pleasure, and was not in the State of Tennessee. He stated that his co-trustee, William Jones, was in the United States of America from June, 1857, until November, 1864, and that he made a second visit to the United States in April, 1890, returning to England in June of the same year, and had not been in the United States since the year 1890. His statements conflict as to when William Jones was in the United States, first saying that he had lived in England continuously since 1880, and stating in another part of his deposition that he visited the United States in 1890.

As to the Poplar Creek Company, the Patterson possession held by it and its vendors was held from the year 1884. Samuel Roberts, the ancestor, did not die until late in the autumn of 1885. The disability of complainants will not avail them as to grant No. 26,058, because the possession on it began before the death of Samuel Roberts. His disability ceased and the statute began to run after his death. It is well settled that no cumulative disability will prevent the bar. *Guion v. Anderson*, 8 Humph., 298, 326; *Weisinger v. Murphy*, 2 Head, 675; *Patton v. Dixon*, 105 Tenn., 97, 58 S. W., 299.

But if witnesses were mistaken in saying the possession for the Poplar Creek Coal Company began before the death of Samuel Roberts, did the statute run by reason of the visits of William and Richard

Jones *et al.* v. Coal Creek Mining & Mfg. Co.

Edward Jones to the United States after they became entitled to sue?

Our statute (Shannon's Code, section 4448) as to persons beyond the limits of the United States and the territories thereof is not like some other statutes of a similar nature which require citizenship in this country in order to bring a former nonresident citizen within the provisions of the law. *Bond v. Jay*, 7 Cranch, 350, 3 L. Ed., 267. Our act does not require a change of citizenship for the removal of this disability. The exception in our statute is as to persons beyond the limits of the United States and the territories thereof, and if they come within the limits of the United States or its territories they are no longer protected by its provisions.

The proof shows that Samuel Roberts died September 14, 1885, after having executed a last will and testament, under which he devised the property in question to William and Richard Edward Jones, the complainants, and their heirs, as trustees to hold the same on behalf of the several shareholders therein and with full power to manage and sell the lands.

It is insisted by complainants that William and Richard Edward Jones are joint trustees, and that before adverse possession could operate against them they would have to both come to the United States at the same time. It is not certain upon this proof when they were in the United States, but Richard Edward Jones was here several times between 1884 and 1892, paying visits in various places, and in one part of his deposition he stated that William Jones visited the United

States in April, 1890, and returned to England in June of the same year.

The complainants are undertaking to set up a disability, and it is incumbent upon them to make out the exceptions. Their place of residence at any particular time is peculiarly within their knowledge. While the burden is on the plaintiff to prove facts necessary to create a bar (*Sou. Coal & Iron Co. v. Schwoon*, 124 Tenn., 176, 135 S. W., 785), yet the burden shifts when the bar is once made out, to the defendant to prove continuing facts necessary, not only to show that he comes within the exception to the statute, but that he remained continuously within such exception for a sufficient length of time as to bring him within the law (*Shropshire v. Shropshire*, 7 Yer., 167; *Apperson v. Pattison*, 11 Lea, 484; *Alvis v. Oglesby*, 87 Tenn., 182, 10 S. W., 313).

Complainants, therefore, not having shown satisfactorily to the court that they were not both within the United States during the time that this adverse possession existed on the land, they must fail in their defense on that question as to the defendant Poplar Creek Coal & Iron Company; it being conclusively shown to have maintained continuous adverse possession since the year 1890, when William Jones was last in this country. Conceding that complainants were trustees in such sense that neither one could convey the land without the other, and that therefore a right could not be acquired against them by prescription or under the statute of limitations unless both should fall within the provisions of the law at the same time,

Jones et al. v. Coal Creek Mining & Mfg. Co.

yet it does not appear that only one of them was here at the time of these visits. Upon the hypothesis assumed, it should have appeared affirmatively that one of these trustees was absent at all times from the United States.

However, this conclusion does not apply to the Coal Creek Mining & Manufacturing Company, because of the uncertainty of its exclusive possession prior to 1890, and it becomes necessary to inquire whether the adverse possession by it has become effective since that time.

The exception contained in our statute as to persons beyond the limits of the United States, as above quoted, was repealed by the legislature by its act of 1901 (chapter 15), which purports to abolish "all exceptions of statutes limiting the commencement of suits and actions in favor of persons beyond the limits of the United States and the territories thereof, and to repeal all laws providing for such exceptions." It is insisted by complainants that this is not a good and valid act, and is unconstitutional and void, especially if effective, as in this case, to extinguish or destroy a right of action which had already accrued. It is argued that the purpose of this act of 1901 was to absolutely and effectively as of that date cut off and destroy all right of action at that time existing in favor of any person beyond the limits of the United States and the territories thereof, unless, as provided in that act, action had already begun.

Complainants cite a number of authorities supporting the text stated in Cyc. vol. 8, p. 921, as follows:

“Statutes reducing or extending the time to bring an action and having a retrospective bearing on existing causes of action, but not affecting such as are already barred, are constitutional in that respect, if a reasonable time is allowed by them for bringing action before they go into operation; but they are held unconstitutional if no such reasonable time is allowed before they go into effect. So, too, they will be held invalid if their effect is to remove a bar once actually gained, which is properly called a vested right.”

It was held in the case of *McGahey v. State of Virginia et al.*, 135 U. S., 662, 10 Sup. Ct., 972, 34 L. Ed., 304, that a new and shorter statute of limitations is not necessarily unconstitutional as to actions which have accrued, if a reasonable time is given by it to bring such action.

In *Slover v. Union Bank*, 115 Tenn., 347, 89 S. W., 399, 1 L. R. A. (N. S.), 528, an act of the legislature of Tennessee was passed upon which provided that:

“No action shall be brought on any claim for usury after two years from the date of the payment of the debt upon which such claim for usury shall be based, provided this act shall not affect any litigation now pending.”

At the time of the passage of that act, complainant Slover had a right of action against the Union Bank, but it was contended by the Union Bank in that case that by virtue of the act of 1903 his right of action was cut off. The court said:

“In order to sustain the validity and constitutionality of this act, we are compelled to give it a prospec-

Jones *et al.* v. Coal Creek Mining & Mfg. Co.

tive, instead of a retrospective, effect. In other words, if the right of action had accrued to any party before the passage of the act to recover for the usury paid, such right would not be affected afterward by the passage of the act, even though the suit had not been brought before its passage.

“The provision of the act that it shall not affect any litigation now pending is entirely nugatory and of no effect, since the legislature could not interfere with the rights of the claimant after suit commenced.

“Striking out this provision, therefore, we have an act which changes the statute from six . . . to two years without mentioning rights of action which had already accrued.

“We think, therefore, that the legislature must have meant to give the act a prospective, and not a retrospective, effect, and that rights of action which had accrued before the passage of the act were not cut off or affected by its operation, inasmuch as no time was given for the enforcement of such rights.”

The act of 1901 now in question provided that it should not apply to any suits or actions then pending, as did the act of 1903, discussed in *Slover v. Union Bank*, and has such similarity in other respects that we think the same rules may apply, in construction, to the act now under consideration. We think the legislature must have intended a prospective effect and that rights of action existing before the passage of the act were not immediately cut off by its operation. But inasmuch as the act repealed all provisions of law making an exception to persons beyond the limits of

the United States and the territories thereof, a proper construction is that, while the exception was cut off as to all future actions, it did not cut off all existing rights of action immediately, but that, inasmuch as the statute of limitations had not then run against such persons, they would have the full period of the statute of limitations thereafter within which to bring suit, which in this case would be seven years. A statute of Illinois, repealing a saving clause in a former act of limitation, was given this construction by the supreme court of the United States, and it was held that the statute ran, against a nonresident who was previously within the exception, from the date of the repeal. *Lewis v. Lewis*, 7 How. (U. S.), 776, 12 L. Ed., 909.

While a statute of this nature is generally held invalid unless it gives a time within which to sue, in favor of any person affected who has a cause of action, yet the court will construe an act so it will be constitutional, if this can be done reasonably. Most of the cases on this question pertain to statutes of limitation enacted shortening the time within which to sue. This is a case where an exception is repealed, bringing the person who is beyond the United States and the territories thereof on the same footing as other persons generally. A right of this nature to sue cannot be suddenly cut off. To do so would be to destroy by one stroke a right which at the time of the enactment of the new law one possessed, and which was in the nature of a vested right. In order to save the statute the court will so apply its operation as to give the

Jones *et al.* v. Coal Creek Mining & Mfg. Co.

person affected his right of action if this can be reasonably done; whereas one had a cause of action at the moment of the passage of the act by virtue of the saving clause before that time in effect, he is now, from its repeal, placed for the first time where a limitation will completely operate against him. He is then on the footing of other persons generally. By the old statute he had only three years from the removal of the disability within which to sue, but he cannot, after the repeal, be affected by the three-year provision because his three-year saving is gone. He is now faced with a seven-year statute which for the first time may unqualifiedly apply to him. The legislature might have given a reasonable time within which to sue by a person thus under disability short of the period of seven years by this repealing act, but he must have been given a reasonable time to assert his right. The legislature did not in terms give additional time after the repeal for any one to sue who might have a cause of action. Not having so done, the reasonable construction is that, having removed the disability, the person having the right of action was intended to have his full seven years within which to bring suit from the date of the repeal.

A statute of limitations, inasmuch as it takes away the remedy only and does not impair the obligation, may affect the remedy on contracts or rights made or acquired before as well as those made after the passage of it. But this has its qualifications, based on sound principle, that in order to give one his day in court he must be allowed a reasonable time after the

Jones *et al.* v. Coal Creek Mining & Mfg. Co.

removal of his disability within which to sue. It was in consideration of this principle that our three-year saving provision was enacted.

We can see no other logical conclusion than that the repealing act of 1901 has not cut off the right, but has for the first time placed complainants where they must sue within seven years. So the statute began to operate against complainants from the year 1901. The complainants are given their day in court by this construction, after the removal of their disability, and the statute is a valid and constitutional repeal.

Complainants contend, however, that they instituted suit against defendant Coal Creek Mining & Manufacturing Company, September 10, 1903, which was dismissed without prejudice October 6, 1909, and that this action was brought within one year of such dismissal, which they are permitted to do under our statute, Shannon's Code, section 4446. An amendment to the original bill avers that suit was brought by complainants to recover the land set out and described in the present suit, and averring dismissal and new suit brought, as they now contend. The defendants answered, denying the averments of this amendment.

There is an agreement of counsel in the record as follows:

“It is further agreed that the original suit of *William and Richard Edward Jones, Trustees, etc., v. Coal Creek Mining & Manufacturing Company*, No. 1108, was filed September 10, 1903, and was dismissed without prejudice October 6, 1909.”

Jones *et al.* v. Coal Creek Mining & Mfg. Co.

This agreement does not state that the suit referred to was to recover this same tract of land, but it is between the same parties and describes the complainants as trustees. In view of the averments in the bill, we have no doubt but that counsel intended to agree that it was the same suit. At any rate, we shall so consider it, since agreements of this nature should be liberally construed in accordance with the true intention. We have no doubt but that the suit was for the same subject-matter, or else the agreement would have indicated to the contrary.

It therefore appears that there had been no effective adverse possession on grant No. 40,475, because complainants were within the exception to the statute prior to the act of 1901, repealing that exception, and their original suit was brought in 1903, saving their right since that time.

Complainants insist, further, that the defendants have not sufficiently set up their plea of the statute of limitations, and, upon the other hand, the defendants contend that the complainants have not sufficiently pleaded their immunity from the statute because of their residence beyond the limits of the United States and the territories thereof. It is unnecessary to determine whether these pleas, strictly speaking, were sufficient. The whole course of procedure in regard to ejectment suits is provided for in the statute of 1851-52 (chapter 152), embraced in Shannon's Code, section 4970 *et seq.*, simplifying in a systematic way the practice. By subsection 8 of that statute (Shannon's Code, section 4980) it is provided:

“The defendant may plead that he is not guilty of unlawfully withholding the premises claimed by the plaintiff, and upon such plea may avail himself of all legal defenses.”

The first clause of the act of 1819 not only cuts off the right of action against the owner in favor of one having had seven years' adverse possession of any lands in this State under registered assurance of title purporting to convey the estate in fee, but is thereby vested with a good and indefeasible title in fee to the land described in his assurance of title.

This court held in *Coal & Iron Company v. Schwoon*, 124 Tenn., 176, 135 S. W., 785, that so far as an issue is concerned as to an adverse possession which operates to transfer title, it is unnecessary to plead the statute of limitations.

In *Drewry et al. v. Nelms* (decided by this court at the last Jackson term), 132 Tenn. (5 Thomp.), 254, 177 S. W., 946, it was held that under our statute providing that in ejectment the defendant may plead that he is not guilty of withholding the premises claimed by the plaintiff, and under such plea may avail himself of all legal defenses, it is unnecessary to plead the statute of limitations on the effect of the statute to toll the title, arising in an ejectment suit, and that it follows necessarily an exception to the statute need not be pleaded.

The case of *Graham's Heirs v. Nelson*, 5 Humph., 605, was one where the statute of limitations (Acts 1819, ch. 28) did not apply because there was no ad-

Jones *et al.* v. Coal Creek Mining & Mfg. Co.

verse claim to the party entitled to the land. A limitation was insisted on, notwithstanding there was no adverse possession, and it was held that the act of 1819 did not apply. It was also held that the pleas attempted to be made were not properly interposed, but this was rather incidentally remarked; the controlling question in the case being that there was no adverse possession. That case was decided in 1845, before the passage of our act of 1851-52, simplifying ejectment suits.

In *Gross v. Disney*, 95 Tenn., 592, 32 S. W., 632, it was held that a plaintiff who relies upon disability to avoid the effect of the statute of limitations must allege that it existed when the cause of action accrued, and also that it continued to the time when it would be an answer to the bar. The court in that case, however, did not discuss, and we assume that its attention was not called to, the provisions of our Code with respect to ejectment suits, and the effect of adverse possession in such cases. While the rule stated in *Gross v. Disney* is the general rule and applies in other actions, it has no application under our statutes to ejectment cases, where the holding of possession has the effect to toll the title. The pleadings of all parties in this suit are sufficient, since these matters all arise under the one question of title to the land, which is averred upon the one hand and denied upon the other.

It is next insisted by the complainants that the title papers of the defendants did not purport to convey the land covered by older and superior titles such as

Jones *et al.* v. Coal Creek Mining & Mfg. Co.

the title of the complainants in this cause, and are not sufficient as colors of title. It is insisted that the deed of E. F. Wiley *et al.* to the Wiley Coal Company, conveying grant No. 40,475, only purports to convey all the right, title, and interest of every character and description, both legal and equitable, in whatsoever capacity they may hold the same, of the grantors, in an undivided one-half interest to said land. It is further insisted that the Wiley Coal Company, in selling to the Coal Creek Mining & Manufacturing Company, only undertakes to convey its right, title, and interest in said tract of land; also that in the deed of Chapman and wife to the Coal Creek Mining & Manufacturing Company it only purported to convey all the lands, premises, leaseholds, interest, mining rights, interest in coal and minerals, iron furnaces, coke ovens, and interests in lands situated in the counties of Roane, Anderson, and Morgan, State of Tennessee, which were heretofore owned by the Oakdale Iron, Coal & Transportation Company. It is insisted that at the time of the execution of these deeds the possessions had not run, and that the only title held by the parties was such as they owned under the Wiley and McEwen grant; that therefore these instruments would not be a color of title to that portion of the land covered by the superior title of complainants.

Complainants cite the case of *Briar Hill Collieries v. Gernt*, 131 Tenn. (4 Thomp.), 542, 175 S. W., 560. Upon looking to these conveyances, however, we are of opinion that they are not identical with the instrument under consideration in that case, but rather fall

Jones *et al.* v. Coal Creek Mining & Mfg. Co.

within the principles announced in *Coal & Iron Company v. Schwoon*, 124 Tenn., 176, 135 S. W., 785, which were also approved in the *Gernt Case*. In the *Schwoon Case* it was held that all parts of the deed must be construed together, without regard to its mere formal divisions. The words "of quitclaim" in that deed were taken in connection with the will of W. C. Hill, and the tax deeds made to Hill, all of which, taken together, made out a good color of title. It was held that the tax deed should be taken in connection with the will, since the deed of the executor, the one under consideration, referred to the will and purported to convey the interest of his testator; that this necessarily referred to his title papers, both of which were duly registered in the county at the time the deed was made.

The deed of E. F. Wiley and others to the Wiley Coal Company, and of the Wiley Coal Company to the Coal Creek Mining & Manufacturing Company, referred to grant No. 40,476 to Edwin F. Wiley and J. F. McEwen. The latter deed also refers to the land as being the land conveyed to the party of the first part by E. F. Wiley *et al.* The grant to Wiley and McEwen purports to vest a one-half interest in the land to E. F. Wiley. The deed when read in connection with the grant, to which it refers, makes out a good color of title to an undivided one-half interest. In the deed of E. R. Chapman to the Coal Creek Mining & Manufacturing Company, all lands were conveyed that were heretofore owned by the Oakdale Coal, Iron & Transportation Company, and its title papers and

Jones *et al.* v. Coal Creek Mining & Mfg. Co.

deeds referred to purport to convey the estate in fee to the other one-half interest, which makes color of title to that share.

Complainants finally say that in any event they should be decreed that part of the Alex Galbreath grant, No. 23,134, which lies within the boundary of the Samuel C. Young grant. Complainants take the position that, inasmuch as the Coal Creek Company claims under this grant and that there is no possession on the interlap of it and complainants' grant, that portion of the land would be unaffected by the statute of limitations. While it appears that the Coal Creek Company does have a deed to this particular 200-acre tract of land, and that a portion of it interlaps with complainants' boundary, yet that portion lies altogether within the boundary of grant No. 26,058 to William Bailey, claimed by the Poplar Creek Coal & Iron Company. There is no exclusion of this 200 acres in the muniments of title of the Poplar Creek Coal Company, and it had constructive possession to the extent of its boundary by virtue of its actual possession. There being no title in this grant No. 23,134, within the interlap, it being inferior to the Samuel C. Young grant, the only title necessary to be affected by the adverse possession was that of complainants, the superior title. When that was barred, all was barred.

For the reasons herein stated the complainants will recover all that part of grant No. 40,475, which interlaps with grant No. 22,382. The bill will be dismissed as to all the land lying within grant No. 26,058. If adverse possession by the Poplar Creek Company and

Jones et al. v. Coal Creek Mining & Mfg. Co.

its vendors was interrupted by an adverse possession by John Bunch for Byrd, which is not clear on the record, and if it was not effective by failure of complainants, joint owners, to come within the United States, it has been effective on this tract since the repeal of the exception clause in 1901. The Poplar Creek Company was not sued until after more than seven years from this repeal. The possession was continuous during this seven years. Defendant Coal Creek Mining & Manufacturing Company will pay one-half, and complainants will pay the other half, of the costs of the cause.

Jones et al. v. Coal Creek Min. & Mfg. Co.

JONES *et al.* v. COAL CREEK MIN. & MFG. CO. *et al.**
(Knoxville. September Term, 1915.)

1. ADVERSE POSSESSION. Requisites. Burden of proof.

One seeking to show title by adverse possession has the burden to make out by clear and positive testimony such adverse possession as will bar the real title. (*Post*, pp. 184, 185.)

2. ADVERSE POSSESSION. Requisites. Burden of proof.

Although instruments under which an adverse claimant made his claims did not appear, but it was established that there was such a claim, another claimant, seeking in an action to establish title by adverse possession, has the burden of clearing up the questions raised by the existence of the other claim, and of showing its invalidity. (*Post*, p. 185.)

3. ADVERSE POSSESSION. Requisites. Evidence. Burden of proof.

In spite of the principle that a tenant cannot attorn to another, so as to hold adversely to his landlord without notice to him, where it appeared that a tenant had claimed adversely to his landlord because of certain suits involving the landlord's title, one seeking to establish adverse possession to the same land, as against both the landlord and the tenant and their assignees, has the burden of showing positively that the tenant had no title by adverse possession. (*Post*, pp. 185, 186.)

4. ADVERSE POSSESSION. Requisites. Exclusive possession. Effect of double claims.

Although the true owner of land against whom an adverse claim is asserted has presumptive title to all land not within the actual inclosures of the adverse claimant, that is not true of a mere trespasser; and possession by two adverse claimants, neither of which has title, neutralizes the possession of each in the overlap, priority of possession creating no advantage. (*Post*, pp. 186, 187.)

*As to what constitutes residence out of the State within the meaning of the statute of limitations see note in 17 L. R. A., 225; 47 L. R. A. (N. S.), 309.

On quit claim deed as color of title for purposes of adverse possession see note in 4 L. R. A. (N. S.), 776.

On sufficiency and effect of "return" to State by defendant to start statute of limitations running see note in 23 L. R. A. (N. S.), 547.

Jones et al. v. Coal Creek Min. & Mfg. Co.

Cases cited and approved: Hunnicutt v. Peyton, 102 U. S., 333; White v. Lavender, 37 Tenn., 648; Berry v. Walden, 5 Tenn., 174-177; McClung v. Ross, 5 Wheat. (U. S.), 116; Creech v. Jones, 37 Tenn., 631; Waddle v. Stuart, 36 Tenn., 535; Norvell v. Gray, 31 Tenn., 96, 107; Iron Co. v. Railroad, 131 Tenn., 236; Walker v. Fox, 85 Tenn., 154.

FROM ANDERSON.

Appeal from the Chancery Court of Anderson County.—HUGH G. KYLE, Chancellor.

SAWYER & UNDERWOOD and LUCKY & ANDREWS, for appellants.

SCOTT & CHANDLER and WRIGHT & JONES, for appellees.

MR. JUSTICE FANCHER delivered the opinion of the Court.

A petition has been filed to rehear this case.

The position taken by the petitioner, that the possession of John Bunch, while he held for one Byrd, will be limited to the inclosure so held by him for Byrd, in its effect to neutralize the possession of defendant, cannot be sustained under the facts in this case. It is upon the testimony of John Bunch alone that the defendant relies to prove its adverse possession by Jerry Bunch and John Bunch. This witness shows that, while the possession of Jerry Bunch was being held by

him, that he (John Bunch) was also holding under a lease from Byrd, and that it was of this land. He shows, furthermore, that there was litigation over the land, and that he continued to hold for Byrd until the litigation was ended. The proof, therefore, establishes that it was this identical land of which he was in possession under a lease. The lease itself might define boundary and extend the constructive possession so as to cover the land. Presumably it did so from this testimony. If there were no instrument defining boundary, the possession would be confined to the actual inclosure. But it is incumbent upon the defendant to make out by clear and positive testimony such adverse possession as will bar the real title. In the effort to make out such possession, the defendant's own witness proves that its possession was mixed, or, to say the least, left it seriously in doubt on this point.

While the color of title or instrument under which Byrd was claiming, and the lease to his tenant, neither appear, we think this was a matter which the defendant Coal Creek Company should have cleared up, inasmuch as the facts are presented through the testimony of a witness introduced by it, and the burden was cast upon it to make out such possession as would bar the owner.

It is insisted that John Bunch could not hold adversely to his landlord without notice. The statement of the law is correct that a tenant cannot attorn to another, so as to hold adversely to his landlord, without notice to him. But here the principle is misapplied.

Jones et al. v. Coal Creek Min. & Mfg. Co.

A law suit was pending, probably over this very holding of John Bunch for Byrd. If no such notice was had, it was the duty of the defendant to bring it out since the matter was introduced through defendant's own witness, leaving its own proof of adverse possession, to say the least, in a state of uncertainty and doubt.

Another point raised in the petition as we understand, is that the Coal Creek Company, being first in possession, would have a superior right, and that the entry by Byrd upon the land would not have the effect to drive back the other claimant to his actual boundary or neutralize its constructive possession of the land. The position relied upon would apply if the Coal Creek Mining & Manufacturing Company had been the true owner. In such case the law regards the possession is with the true owner as a superior right, and if, while he is in actual possession of his land, a claimant without title enters, he will be confined to his actual inclosures though he have color of title. This is upon the ground that there can be only one possession of land, and in a contest between the true owner and a trespasser, both attempting to hold actual adverse possession at the same time, the constructive possession as to that part of the land outside the actual inclosures is held to be that of the owner. 2 Corpus Juris, pp. 242, 243; *Hunnicutt v. Peyton*, 102 U. S., 333, 26 L. Ed., 113; *White v. Lavender*, 5 Sneed, 648; *Berry v. Walden*, 4 Hayw., 174-177; *McClung v. Ross*, 5 Wheat. (U. S.), 116, 5 L. Ed., 46; *Creech v. Jones*, 5 Sneed, 631;

Jones et al. v. Coal Creek Min. & Mfg. Co.

Waddle v. Stuart, 4 Sneed, 535; *Norvell v. Gray*, 1 Swan, 96, 107; *Iron Co. v. Railroad*, 131 Tenn. (4 Thomp.), 236, 241, 174 S. W., 1122.

Not so, however, as between two mere claimants without title. Where disputed land is covered by deeds of both parties, and each has possession within the interference, but neither has title, their possession neutralizes each other as to the land within the lap not in actual possession of either. *Walker v. Fox*, 85 Tenn., 154, 2 S. W., 98.

In this case the Coal Creek Company did not have title. It was in the attitude of a mere trespasser on the land until its full seven years' actual, exclusive, continuous, and adverse possession had been effective. If during that time another trespasser, claiming the land, entered under an instrument defining boundary, there would be a conflict between the two trespassers; neither being rightly upon the land. The holding of the one would neutralize the holding of the other, or rather the entry of the last trespasser would rob the holding by the first of its unmixed character.

Other questions raised are not well taken. The petition will be overruled.

Sams v. State.

OSCAR SAMS v. STATE.

*(Knoxville. September Term, 1915).***1. CRIMINAL LAW. Pleas. Necessity of plea.**

Where the record failed to show that a plea of not guilty was interposed, and there was nothing in the transcript from which an implication might arise that such a plea was filed, a verdict and judgment were nullities as there was no issue for the jury to try. (*Post*, pp. 191, 192.)

Cases cited and approved: *Link v. State*, 50 Tenn., 252; *Wallace v. State*, 72 Tenn., 309; *Lynch v. State*, 99 Tenn., 124; *Muse v. State*, 106 Tenn., 181.

Code cited and construed: Sec. 7173 (S.)

2. CRIMINAL LAW. Bill of exceptions. Necessity.

A plea, when stricken, ceased to be a part of the record, and to make it a part of the record so that it could be reviewed, it was necessary to incorporate it into a bill of exceptions, together with the court's action in respect to it. (*Post*, pp. 192, 193.)

3. INFANTS. Crimes. Criminal procedure. "Delinquent Child."

Where the evidence showed without dispute that defendant was under sixteen at the time of his arrest and at the time of the court's action on a motion in arrest of judgment, it should have sustained the motion and transferred the cause and the custody of defendant to the juvenile court under Acts 1911, ch. 58, defining a "delinquent child" as any child under sixteen who violates any law of the State, and providing that, when a child under sixteen is arrested, he shall be taken directly before the juvenile court, and that, if he is taken before a justice of the peace or police magistrate, or any other official or court having jurisdiction of the alleged offense, it shall be the duty of such court or official to transfer the cause to

Sams v. State.

the juvenile court, and the officer having the child in charge shall take him before that court. (*Post*, pp. 193-197.)

4. INFANTS. Crimes. Criminal procedure.

Acts 1911, ch. 58, sec. 9, provides that, when a child under sixteen is adjudged a delinquent child, he shall be deemed a ward of the juvenile court, which may, in its discretion, retain jurisdiction and control of such child until he arrives at the age of twenty-one, and that any child committing a misdemeanor or felony, and found to be a delinquent child, and thereafter found by the court to be incorrigible and incapable of reformation or dangerous to the welfare of the community, may, in the court's discretion, be remanded to the proper court of the county in which the crime was committed and tried for such crime. Section 10, provides that, when a child under sixteen is arrested, he shall be taken directly before the juvenile court, or, if he is taken before a justice of the peace or police magistrate, or any other official or court having jurisdiction over the alleged offense, it shall be the duty of such justice, court, or official to transfer the case to the juvenile court, and the officer having the child in charge shall take the child before that court, which shall proceed to hear and dispose of the case. *Held*, that where, though it appeared that defendant was under sixteen at the time of his arrest and at the time of his motion in arrest of judgment, the circuit court failed to transfer the cause and the custody of the child to the juvenile court, its failure to do so did not defeat the jurisdiction of the juvenile court, and that court subsequently had jurisdiction to deal with the child, though he was then over sixteen; the custody which the circuit court and its officers had of defendant being regarded as held for the juvenile court. (*Post*, pp. 193-197.)

Acts cited and construed: Acts 1911, ch. 58, sec. 9.

FROM HAMBLIN.

Sams v. State.

Error to the Circuit Court of Hamblen County.--
G. MC. HENDERSON, Judge.

JOHN R. KING, for plaintiff in error.

WM. H. SWIGGART, JR., Assistant Attorney-General,
for the State.

MR. JUSTICE BUCHANAN delivered the opinion of the
Court.

Plaintiff in error, Oscar Sams, was charged, by indictment, with the offense of unlawfully carrying about his person certain unlawful weapons, pistols and revolvers, contrary, etc. To this indictment he filed a plea raising the question that the circuit court was without jurisdiction to try him upon the charge preferred. The substance of this plea was that at the time the offense was alleged to have been committed by him, he was under the age of sixteen years, and that the jurisdiction to deal with him was not in the circuit court, but in the juvenile court of Hamblen county. His plea was verified by his oath. The State moved to strike the plea. The court sustained the motion and the plea was stricken, to which action exception was reserved.

By the same minute entry which shows the above it is recited:

“Thereupon came the attorney-general *pro tem*, in behalf of the State, and the defendant in proper person and by attorney; came also a jury of good and

Sams v. State.

lawful men, to wit," naming them, who "upon their oaths do say that they find the defendant guilty as charged in the indictment."

The next step appearing in the same minute entry was a motion for a new trial, based on the action of the court in overruling the plea to its jurisdiction. The court overruled this motion. Then appears in the same minute entry a motion in arrest of judgment, based on the ground that the defendant was under the age of sixteen years at the time the State's proof showed the alleged offense to have been committed. The court overruled this motion. To each of the foregoing actions by the court the defendant reserved his exception. Then in the same minute entry appears the judgment of the court, which imposed upon plaintiff in error a fine of \$50, and the costs of the cause, and ordered that he be committed to the county workhouse in case of failure to pay the fine and costs. It also appears in the same entry that plaintiff in error prayed, and was granted, an appeal to this court.

We think the judgment of the court below must be reversed on two grounds: First, because there is no showing of record that plaintiff in error ever plead to the merits of the cause. Waiving for the moment the question of jurisdiction, we consider this point.

The record fails to show that the plea of not guilty was interposed; therefore there was no issue between the State and plaintiff in error for a jury to try, and the verdict of the jury was a nullity, and so is the judgment based thereon. Our statute provides:

Sams v. State.

“If the defendant refuses or neglects to plead, or stands mute, the court shall cause the plea of not guilty to be entered and proceed with the trial as if the defendant had put in the plea.”

See section 7173, Shannon's Code; also *Link v. State*, 50 Tenn. (3 Heisk.), 252; *Wallace v. State*, 72 Tenn. (4 Lea), 309; *Lynch v. State*, 99 Tenn. (15 Pick.), 124, 41 S. W., 348; *Muse v. State*, 106 Tenn. (22 Pick.), 181, 61 S. W., 80. In the case last named the transcript showed that the jury “were sworn to try the issues joined,” and the “necessary inference” was held to be that a plea of not guilty was interposed; so that case was distinguished from *Lynch v. State*, supra. We find nothing in the transcript in the present case from which an implication may be said to arise that a plea of not guilty was filed. If the circuit court had been clothed with jurisdiction to try this cause, what we have said above would suffice under our authorities to justify a reversal of the judgment, and a remand of the cause for further proceedings in the circuit court. But the most difficult question in the present case is how plaintiff in error shall be dealt with in the circuit court upon the remand of the cause; in other words, what is the jurisdiction of that court in respect of the charge in the indictment set out against this particular plaintiff in error under the facts of this case and our existing statutes.

For the State it is insisted that, in so far as the plea to the jurisdiction of the circuit court is concerned, the action of the trial judge thereon cannot be reviewed. This insistence is grounded upon the idea

Sams v. State.

that when the plea was stricken it ceased to be a part of the record, and that, in order thereafter to make it a part of the record, it was necessary that it should be incorporated into the bill of exceptions, together with the action of the court in respect of it.

So far we think the view of the State is correct; but nevertheless the question of the jurisdiction of the circuit court is directly presented in this cause, when we come to consider the assignment of error based on the action of the court in overruling the motion in arrest of judgment. That motion was based on the lack of jurisdiction in the circuit court. The court could then see from the proof in the cause that plaintiff in error was under the age of sixteen years at the time of his arrest, and indeed under such age at the time of the court's action on the motion in arrest of judgment, and of course under such age at the time the indictment charged the offense to have been committed. These facts clearly appeared without dispute in the evidence which had been introduced before the jury.

When these facts appeared to the trial court, it should have sustained the motion in arrest of judgment, for the reason that, under chapter 58, Acts of 1911, plaintiff in error was a "delinquent" child, within the meaning of section 1 of that act. That section defines a delinquent child as any child under the age of sixteen years who violates any law of the State, etc. We now quote from certain pertinent sections of that act as follows:

Sams v. State.

“Sec. 10. That when a child under the age of sixteen (16) years is arrested with or without a warrant or upon a *capias* or other process issued from any criminal court, such a child shall, instead of being taken before a justice of the peace or police magistrate, or instead of being held to bail or incarcerated for his appearance before any criminal court, be taken directly before such juvenile court; or if the child is taken before such justice of the peace or police magistrate or any other official or court having jurisdiction over his alleged offense, it shall be the duty of such justice of the peace or police magistrate or court or such other official to transfer the case to the juvenile court, and the officer having the child in charge shall take the child before that court, and in any case the court shall proceed to hear and dispose of the case in the same manner as if the child had been brought before the court upon petition as herein provided. In any case the court shall require notice to be given and investigation to be made as in other cases under this act, and may adjourn the hearing from time to time for this purpose.

“Sec. 11. That no court or magistrate shall commit a child coming under the provisions of this act to any jail, lockup, or police station for punishment for any offense committed under this act.”

“Sec. 9. . . . Whenever a child under the age of sixteen (16) years is adjudged a delinquent child under the provisions of this act, such child shall be deemed a ward of the juvenile court, and the court may, in its

Sams v. State.

discretion, retain jurisdiction and control of such child in accordance with the provisions of this act until he or she shall have arrived at the age of twenty-one (21) years. Any child who shall have committed a misdemeanor or felony, and who shall have been found by the court to be a delinquent child within the meaning of this act and committed hereunder, and who shall thereafter be found by the court to be incorrigible and incapable of reformation or dangerous to the welfare of the community may, in the discretion of the court, be remanded to the proper court of the county in which such crime was committed, and be proceeded against and tried for such crime, and if found guilty of the commission thereof, be subject to judgment therefor in the same manner as if he had been over the age of sixteen (16) years when such crime was committed; provided, that no statute of limitations now in force affecting any criminal law shall operate in favor of any such child during the time it is in the care and custody of the juvenile court created under this act; provided, that if upon the investigation of any cause coming under the terms of this act, the judge of the juvenile court shall conclude that there is probable cause to believe that the child has been guilty of the crime of rape, murder in the first degree, or murder in the second degree, in that event the court shall at once dismiss said cause from its court and assume no further jurisdiction thereof than to at once remand said child to the sheriff of the county, to be dealt with for such, his alleged offense, as provided in criminal laws of the State.”

Section 1 of the act provides:

“That this act shall apply only to children sixteen (16) years of age or under.”

Our construction of the foregoing provisions of the act of 1911 in connection with the entire act and its evident policy is that, when the arrest of plaintiff in error was made, though not by order of the juvenile court, that court acquired immediate jurisdiction over his person. The latter part of section 1 of the act provides that:

“When jurisdiction has been acquired under the provisions of this act over the person of a child, such jurisdiction shall continue for the purposes of this act until the child shall have attained its majority.”

While it is clear that the circuit court should have sustained the motion in arrest, and should have transferred the cause and the custody of plaintiff in error to the juvenile court, yet we think the error of the circuit court in failing so to do did not defeat the jurisdiction of the juvenile court. That court, in our opinion, has jurisdiction to deal with plaintiff in error at the present time, though he is now beyond the age of sixteen years as fully for all purposes as such jurisdiction would have been vested in it had the circuit court proceeded in accordance with section 10; also as fully as if the arrest of plaintiff in error had, in the first instance, been made by one of the officers of the juvenile court, acting within the scope of his duty, or under the order of that court. In other words, in contemplation of the act of 1911, the custody

Sams v. State.

which the circuit court and its officers have had of the person of plaintiff in error has been held for the juvenile court, and it is the duty of that court now to deal with plaintiff in error as if he had been held in custody by it, or its officers, since the alleged date of the commission of the offense against the State law. If the juvenile court, in its dealing with plaintiff in error, shall find him to be incorrigible and incapable of reformation or dangerous to the welfare of the community, he may, in its discretion, be remanded to the circuit court, and there be proceeded against and tried for the offense set out in the indictment in this cause, and, if found guilty of the offense, he may, by the circuit court, be subject to judgment therefor in the same manner as if he had been over the age of sixteen years when the offense was committed. See section 9 of the act.

It results that the judgment of the circuit court will be reversed, and this cause remanded to be proceeded with as indicated in this opinion, and a copy hereof will be attached to the *procedendo* on the remand of the cause.

Watson v. State.

ALLAN WATSON v. STATE.*

(Knoxville. September Term, 1915.)

1. CRIMINAL LAW. Evidence. Opinion. Insanity.

In a criminal case, a hypothetical question intended to elicit opinion evidence as to defendant's sanity, is incompetent, unless addressed to an expert on insanity. (*Post*, pp. 200-202.)

Case cited and approved: *Ashby v. State*, 124 Tenn., 684-723.

2. CRIMINAL LAW. Evidence. Insanity. Qualification of expert.

Where a medical practitioner, testifying in a criminal case, admitted that he had read of insanity only in such books as were possessed by the ordinary practitioner, that he had made no special study of mental disease, and did not regard himself as so well posted on insanity as on typhoid fever, pneumonia, and such general diseases, he was not qualified as an expert on the subject. (*Post*, pp. 200-202.)

3. CRIMINAL LAW. Evidence. Opinion. Insanity. Form of question.

In a prosecution for forgery, where a medical witness was asked the question, "Taking into consideration what you know of defendant's ancestors and his family, and what you know of him personally, and then taking into further consideration the further fact, if it be a fact (stating certain facts assumed to have been shown by the evidence), state whether or not, in your judgment, defendant had a sound mind," such question was improper, and the answer thereto properly excluded, since it called for the witness' opinion, based not only on the facts stated, but also on what the witness knew of the defendant personally, his family and ancestors. (*Post*, pp. 200-202.)

4. CRIMINAL LAW. Intent. Insanity.

Where defendant forged indorsements to a note, having sense enough to know that his act was a violation of law, he was

*On weakness of mind as affecting responsibility for criminal act see note in 10 L. R. A. (N. S.), 999.

On measure of proof of insanity in criminal cases see note in 39 L. R. A. 737.

On nonexpert opinion as to sanity see note in 38 L. R. A., 721.

Watson v. State.

punishable, though believing that Providence would intervene to prevent his detection and punishment, yet one so deficient in mind that he has no sense of right or wrong, nor capacity to reason about the quality of his act and no consciousness of wrongdoing, is not guilty of crime in committing a criminal act, since he has no criminal intent. (*Post*, pp. 202-216.)

Cases cited and approved: *Johnson v. State*, 100 Tenn., 252-259; *Commonwealth v. Rogers*, 48 Mass., 500; *Guiteau's Case*, 10 Fed., 161; *Reynolds v. United States*, 98 U. S., 145.

Cases cited and distinguished: *Mahon v. State*, 127 Tenn., 535-549; *Bond v. State*, 129 Tenn., 75; *Stuart v. State*, 60 Tenn., 177.

5. FORGERY. Sufficiency of evidence.

In a prosecution for forging indorsements, evidence *held* sufficient to sustain verdict of guilty. (*Post*, pp. 202-216.)

FROM CAMPBELL.

Appeal from the Criminal and Law Court of Campbell County.—XEN HICKS, Judge.

JAMES A. FOWLER, SILAS ROGERS, E. H. POWERS and AGE & PETERS, for appellant.

WM. H. SWIGGART, JR., Assistant Attorney-General, for the State.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

By general verdict of the trial jury Allan Watson was convicted upon an indictment charging forgery

Watson v. State.

in its first count, and passing a forged note in its second count, and from the judgment of the trial court overruling his motion for a new trial and imposing sentence on him, he has prosecuted an appeal.

The only defense on which he relied below was insanity at the time of the commission of the acts charged against him. He did not testify upon the trial of the cause. He advances here two grounds for reversal of the judgment. One of these is that the court below should have allowed Dr. Morris to answer a question, which was in part as follows:

“Taking into consideration what you know of Allan’s ancestors, and the Watson family, and what you know of Allan personally, and then taking into further consideration the further fact, if it be a fact.”

Then followed the statement of certain facts assumed by counsel for appellant to have been shown by the evidence, and the question concluded thus:

“Taking all of these matters into consideration, state whether or not in your judgment he has a sound mind.”

We think the court was correct in excluding the answer of the witness to this question upon two grounds: First, because the question, in part, at least, was hypothetical, and as to so much of it as was of this character opinion evidence was incompetent, except from an expert on insanity. The examination of the witness clearly disclosed his lack of expert knowledge on that subject. He admitted that he had read of insanity only such books as were

Watson v. State.

possessed by the ordinary practitioner, and that he did not regard himself as so well posted on insanity as he was about typhoid fever, pneumonia, and such general diseases, and that he had made no special study of mental diseases. In other words, he falls clearly within the rule laid down in *Ashby v. State*, 124 Tenn. (16 Cates), 684-723, 139 S. W., 872. The second fatal objection to the question is that, if the answer to it had been admitted; and had been that, in the opinion of the witness, Watson was of unsound mind, the jury would have been wholly at sea in determining whether the opinion was based on the facts detailed in the question hypothetically or on some state of facts existing in the knowledge of the witness, but undisclosed by any evidence in the record, for the inquiry of the witness called for his opinion, based not only on the hypotheses stated in the question, but also on what the witness knew of the defendant personally, and of his family and ancestors. In weighing the probative value of this opinion, the jury would have been unable to determine whether to base it on the hypotheses stated in the question, or some supposed and wholly undisclosed knowledge of the witness. The jury might have concluded that the opinion was wholly valueless, so far as it was based upon a supposed statement of facts, on the ground that, in their opinion, these facts were not shown by the evidence, yet they might erroneously have been led to have accepted and given weight to the opinion upon the idea that the doctor had some good reason for

Watson v. State.

entertaining it not disclosed by the question, or any of the evidence which he had theretofore given. The rule of law is that questions calling for the opinion of experts—"must be based on facts admitted or established by the evidence, or which, if controverted, the jury might legitimately find on weighing the evidence." Wharton on Criminal Evidence (10th Ed.) vol. 1, sec. 411; 2 Elliott on Evidence, sec. 1116, note 6.

The next and final point made is that the evidence preponderates against the verdict of the jury.

Plaintiff in error is a native of Hardin county, Tennessee; was about thirty years old at the date of his arrest. His offense in this case was committed on January 18, 1915. He was arrested some months thereafter. When about the age of twelve years (his mother having died when he was about two years old, and he in the meantime having resided with his grandfather in Hardin county) he went to live with his father, who had married again and was residing in Chattanooga. His first entry into business life was in the city of Chattanooga. He had several employments there, and moved from that place to Knoxville about six years prior to his arrest. He became interested in religious matters early in life; joined the church in Chattanooga, and, on coming to Knoxville established church connections here, and was quite active in church work. In Knoxville he appears to have conducted a successful insurance business for some time. At the time of his arrest in this cause his insurance business had grown to such an extent

Watson v. State.

that he was representing several companies. He was regarded as a capable insurance man, and a good business man, and his character for sobriety and morality appears to have been excellent prior to the discovery of certain matters, which will be hereinafter more fully considered.

Some time after coming to Knoxville he became interested in what was known as the "law enforcement movement," and was elected president of the Civic Union, an organization having for its purpose the promotion of law enforcement, and especially the prosecution of violations of the liquor laws. In furtherance of this work a newspaper called The Citizen was published, for which Mr. Watson did most, if not all, of the editorial writing. It resulted that he became quite a conspicuous figure in the law enforcement movement, quite active in matters political, and in the interest of law enforcement he was greatly interested in the personnel of those candidates considered favorable to rigid enforcement of laws. During a good portion of the time of his residence in Knoxville he had also been active in certain charity and church work. All this brought him into contact with many people of all classes, and, among others, with six gentlemen of good position and financial standing, whose names he forged as indorsers to the note set out in the indictment. This note was for the sum of \$1,500. It bore date January 18, 1915; was due four months after date, and made payable to the order of the persons whose names were written

Watson v. State.

on the back of the note. The names of these persons were traced by Mr. Watson on the back of the note from their original signatures, possession of which he had gained in some way. The note was made payable at the National Bank of La Follette. It was signed by Allan Watson, and was purchased by the bank at which it was made payable from Watson, the maker, either on the day of the date of the note, or the next day. It was purchased at the bank's place of business. Prior to this transaction one of Mr. Watson's friends, also a friend of the bank, had, at his instance, written the president of the bank respecting Watson's desire to make such a transaction and the solvency of the proposed indorsement, and had been informed that the bank would take the note. The president of the bank knew of the solvency of the indorsers, and of Mr. Watson's connection with the law and order movement, and was informed by Watson that the money was to be used to further that movement; that he preferred to get the money in La Follette rather than in Knoxville, for the reason that he did not want it known in the latter place that he was using money for the above purpose. Watson's bookkeeper, Miss Adelia Dawn, who was with him in that capacity from February, 1913, until after his arrest, and who was in charge of his office for some time after that event, testified that she remembered the time when he went to La Follette about the note. She said he returned with the \$1,500 in cash and turned it over to her, and the substance of her evidence is

Watson v. State.

that it went into his bank account, and was checked out by him in his business in the usual way. She said the expenses of his insurance business were about \$500 per month, and at the time this transaction happened that he was short in his accounts, with all of the insurance companies he represented, in the aggregate sum of about \$2,800. W. S. McKamey, president of the La Follette National Bank, testified that Watson received from the bank, in currency, only \$1,464 as the proceeds of the sale of the note. After his arrest Watson told Mr. McKamey that at the close of the political campaign for sheriff of Knox county in 1912, he found himself in debt on account of money he had expended therein, in the sum of about \$3,000. He also told McKamey that he owed about \$15,000 or \$16,000 at the time of his arrest. J. Will Taylor testified that after being arrested Watson admitted that he had outstanding \$14,000 or \$15,000 of forged paper, and that he was short with one of his insurance companies for \$500 or more dollars for premiums collected which he had not remitted. About the first of the year 1915, and near the time when the forgeries in the present case were committed, Watson also forged indorsements on a note made by him for \$2,750, which he sold to the Coal Creek Bank. This note he negotiated by using the good offices of another one of his friends in Knoxville, who knew the officers of the Coal Creek Bank, and who knew of the solvency of those persons whose names Watson had placed on the back of the note as indorsers. The aggregate

Watson v. State.

amount of money secured on that note, and on the one sold to the La Follette National Bank, was more than \$4,000, and was more than enough to settle the amount which Miss Dawn states was his arrearage with the insurance companies which he represented; but whether the money so secured was used by him to reduce his debts to the insurance companies to the sum of \$500, which he told Mr. Taylor was the amount he owed one of them at the time he was arrested, does not clearly appear. Nor does it clearly appear whether any of the money so secured went directly to further any law enforcement movement. Testifying to this exact point, as to proceeds of the note sold the La Follette National Bank, Miss Dawn says:

“Q. Isn't it a fact that it went out for office rent, for clerk hire, and for money that he was short with these companies? A. If it went out that way, it was because he had used other money in his work. Q. Didn't it go out for office rent, clerk hire, etc.? A. To cover expenses that he had used the money for in that way. Q. And for money that he was short with his companies, isn't that true? A. Yes. Q. How many companies was he short with? A. Well, he was short with all he had in his office at the time he closed out. He had five companies at the time he closed out.”

This evidence is somewhat in conflict, as will be observed, with the statement made by Mr. Watson to Mr. Taylor.

This brief review of all that need be stated of the evidence at this point brings us to the real question

Watson v. State.

in the case. It is stated on the brief of counsel for appellant in these words:

“The whole contention for the defense is that the accused was so wrought up over the law enforcement work that it destroyed his power of discerning right from wrong about anything connected with, or bearing upon that movement, and hence that he was incapable of committing any offense when the act grew out of or was designed to promote that movement, the evidence showing both his physical and mental condition and also the extent to which his mind was thereby absorbed to the exclusion of everything else.”

It is well to remark that the foregoing contention must be considered in the light of the rule laid down in one of our cases as follows:

“In this court, the burden is upon the plaintiff in error to show his innocence by a preponderance of the evidence. By the verdict of the jury, approved by the trial judge, the presumption of his innocence has been removed and converted into an adjudication of his guilt. Therefore the inquiry here is not whether he is guilty, and the investigation of the record is not made with that in view. But the question is, Is he innocent? And the record is investigated upon the assumption of his guilt. Immaterial conflicts in the testimony of witnesses are not considered. Discrepancies in dates and distances, which are not controlling in their materiality, are disregarded. In many cases, the mere weight to be given to the testimony of witnesses, arising out of their

Watson v. State.

number and general reputation, is disregarded because these questions are all deemed to have been settled by the jury and trial judge, who saw them upon the stand." *Mahon v. State*, 127 Tenn. (19 Cates), 535-549, 156 S. W., 458, 461.

It is not necessary to review the evidence of all of the witnesses who testified for appellants in respect of his mental condition. One of them, whose evidence most nearly corroborates the insistence above copied from the brief said:

"So far as I could tell in religious matters he was very deeply in earnest and spoke of the good he was trying to do, and that he was in it for the good that there was in it, and when he crossed in opinion with the great majority of his friends he expressed himself at different times to me that it was on account of deep conviction of duty, and that he had to go by his own judgment, that he could not go by anybody else's, and that it was just a matter of his own conscience, that he had to follow out the dictates of his own conscience. He seemed to have an idea that he was in the hands of the Divine Power. I cannot say that he just used the words, 'I am in the hands of the Divine Power,' that is as near the substance as I can give you. If he didn't say that, he used words that meant exactly that, that the hand of the Almighty was upon him, and that it made no difference what he got into, he would come out all right in the end. He seemed to have that settled and positive conviction."

Watson v. State.

On the question of plaintiff in error's ability to distinguish right from wrong, the last-mentioned witness said:

"If you asked me the question, if he had a sound mind, I would say, no. That is my positive opinion, that he hasn't a sound mind. Now, if you asked me if he is crazy on all subjects, I would say no, he is not crazy on all subjects, but on the things that I have been talking about, from my conversation with Mr. Watson in the office and the way he did, I am of opinion that he was not of sound mind on the things that we have been talking about. If you asked me whether he knew right from wrong at the time of that forgery, I don't think he was able to calculate the results of that forgery at all. He had sense enough to know that it was a violation of the law. He knew that, but he did not have sense enough to know that he would be caught up with. That man didn't have any more sense than to believe that when he forged that note there would be a divine intervention of Providence."

The jury may have given full credit to the evidence of the witness, and, we may add, to that of each of the other witnesses called on behalf of plaintiff in error, and yet have reached the verdict complained of by him. A man may have the deepest religious convictions and be thoroughly persuaded that the hand of the Almighty is upon him, and that whatever he may do will turn out all right in the end, that Providence will intervene to prevent the detection and punishment of any crime he may commit. Yet if he does

Watson v. State.

an act which in a man of sound mind would be criminal in character, and at the same time the act is done, to use the exact words of the witness, "he had sense enough to know that it was a violation of the law," for which punishment was prescribed, there is no immunity from punishment for him. The law exacts obedience from him as well as others, and when he knows the act he contemplates to be a violation of the law, for which punishment is prescribed, he has then a legal conception of what is right, and also of what is wrong. In legal contemplation to obey the law is right, to violate it is wrong, and if he choose the latter course, the law implies on his part a criminal intent, and punishment is the result of his violation of its mandate, or its prohibition. Yet the law is tender of the life and liberty of the subject, and if the latter be so deficient in mind from any cause that he has no sense of right and wrong, no capacity to reason about the quality of his act, no consciousness of wrongdoing in the commission thereof, then the criminal intent is wanting, and the act is no crime in the eye of the law. Mere ignorance of the law does not of course suffice to rob its violation of criminal character or absolve the delinquent from punishment, for it is wisely held that if he have sense enough to know the difference between right and wrong, it is his duty to know before he commits the act, and so very early in the development of our jurisprudence was the maxim formulated, "*ignorantia legem neminem excusat*," and to such a violation of the law there is

Watson v. State.

imputed the evil intent which is necessary as an element in all crime. In one of our latest cases on this subject it was said:

“The inquiry under the plea of insanity was whether the defendant had capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he was then doing—a knowledge and consciousness that the act he was doing was wrong . . . and would subject him to punishment.” *Bond v. State*, 129 Tenn. (2 Thomp.), 75-83, 165 S. W., 229, 231.

See, also, *Stuart v. State*, 60 Tenn. (1 Baxt.), 177-185. In another of our cases, quoting from Archibold, Cr. Proc., it was said:

“The insanity must be of such a kind as entirely to deprive the person of reason as applied to the act in question, and the knowledge that he was doing wrong in committing it. If, though somewhat deranged, he is able to distinguish right from wrong in his own case, and to know that he was doing wrong in the act which he was committing, he is liable to the full punishment of his criminal act.”

To the above, the opinion in that case added:

“The capacity to know right from wrong, and to know that the particular act being committed is wrong, is recognized as a correct rule in Tennessee, to test the question of criminal responsibility.”

And this rule was approved in *Johnson v. State*, 100 Tenn. (16 Pick.), 252-259, 45 S. W., 436. See, also, *Commonwealth v. Rogers*, 48 Mass. (7 Metc.), 500,

Watson v. State.

41 Am. Dec., 458; *Guiteau's Case*, and note (D. C.), 10 Fed., 161; *Reynolds v. United States*, 98 U. S., 145, 25 L. Ed., 244; Wharton & Stille, Med. Jur. vol. 1 (5th Ed.), secs. 171, 175, 177, 179, 187. No witness called by him, speaking from personal knowledge of the man, was bold enough to express the opinion that Mr. Watson did not know it was a wrong punishable by law to commit forgery at the date of the act in question. Indeed, it is difficult to understand how any one could entertain such an opinion in the face of the most prominent and undisputed facts in the case, to wit: That Mr. Watson's daily life was in large part a battle against violations of the law, and a protest against the failures of the constituted authorities to inflict punishment upon offenders. His intelligence, the acuteness of his intellect, and his capacity to conceal a chain of forgeries, extending from 1912 until 1915; on these and other undisputed facts of the record, the jury may well have concluded that the defense of insanity was a forlorn hope, advanced because no other was possible under the facts.

It is urged that insanity was in the Watson blood; that his mother was a consumptive; that Watson himself was a scrofulitic, a man of poor health, an enthusiast, a badly balanced man. All this may be true, and yet it does not follow that he did not know that forgery was a crime for which the law inflicted punishment when he committed the act in question.

Aside from the defendant's evidence, which we have considered, there is ample evidence of entirely

Watson v. State.

credible character in the transcript tending to show that at the time of the commission of this act Mr. Watson was sane. Eight witnesses testified to this effect, on behalf of the State, basing their respective opinions on their acquaintance with, and observation of, the man, and in view of this evidence the jury may very well have concluded that the crime in question was due to none of the causes relied on by the defense. The primary motive for the crime appears to have been a dire need of immediate funds with which to liquidate certain arrearages to the insurance companies he was representing. Looking back, however, for an explanation of that which created this indebtedness, it appears to be found in some personal peculiarities of the plaintiff in error. Among his most marked characteristics was a vast confidence in the correctness of his own judgment. This, as the result showed, was not always well placed. For illustration, in the selection of a candidate for sheriff in 1912, for which the law and order faction was to vote, a meeting was held, and a vote of the leaders of that faction taken. The vote stood 113 to 3. Mr. Watson was one of the minority. The weight of this vast majority of the leaders of his faction did not, however, have the effect to change his views. He continued to stand for his candidate, and it was at the close of this election that he found himself short about \$3,000, and this was the beginning of the double life which he subsequently led in Knoxville. After his arrest he told Mr. McKamey that he began forging paper in

Watson v. State.,

1912, at the close of this sheriff's race, in order to meet this \$3,000 shortage. A complete history of his forgeries does not appear in the record, but it is clearly shown that nothing was known of them during these three years until a very short time before his arrest, when his total indebtedness was between \$15,000 and \$16,000. Just what part of this was taken care of by forgeries, and just what part by genuine indorsements, does not clearly appear. It is argued that this course of conduct is in itself an evidence of unsound mind, but, on the other hand, the jury may have considered it, in the light of all the evidence, only an indication of a very obstinate and self-willed character. This latter view is strengthened by a circumstance now to be related. There is evidence tending to show that Mr. Watson's original plan in respect of the note which he sold to the La Follette National Bank was to get the genuine indorsements of the six gentlemen whose names appeared on the back of that note. But in this he failed. Whereupon he forged their indorsements, tracing them upon the note from genuine signatures in his possession, so that the traced signatures closely resembled the genuine. This, on the one hand, may be said to indicate insanity, yet, on the other hand, pride of opinion, self-will, and determination to have his own way about the matter. Again it is in evidence that quite early in his business career, when he was confidential man and stenographer for Mr. Loupe, superintendent of the Southern Express Company, at Chattanooga, Mr.

Watson v. State.

Watson desired to secure for one of his friends a position as an employee of the company. He knew of a vacancy which he desired his friend to fill. He endeavored first to get Mr. Loupe to take favorable action on an application which he presented for his friend. Mr. Loupe declined to take immediate action, yet that very day Mr. Loupe unknowingly signed a letter which Mr. Watson handed him along with several others. This letter awarded the coveted place to Mr. Watson's friend. This early incident in his life is related by one of his witnesses who seemed to see in it only an act of kindness done by Mr. Watson on behalf of his friend. The jury, on the other hand, may have considered it an indication of the imperious spirit which seems in later life to have dominated the man, to his hurt and injury. To secure the loan from the La Follette National Bank he did not hesitate to place one of his friends, also a friend of the bank, in a very embarrassing position, and the same was true of his action in respect of the loan which he secured from the Coal Creek Bank. In the latter instance he went to the point of making his friend believe, and so represent to the bank, that he had seen an indorser write his name on the back of the note which the bank purchased. He afterwards confessed to his friend that this was accomplished by presenting to the indorser a renewal of a note on which the indorser was already bound. The indorser signed his name on the back of the renewal note in the presence of Mr. Watson's friend. After they left the in-

Watson v. State.

dorser's office Mr. Watson showed his friend the name of the indorser which he had traced on the back of the note that later passed into the hands of the Coal Creek Bank. The friend thought it was the genuine signature of the indorser which he had seen written on the back of the other note. All this he confessed to his friend after his arrest. When the fact became publicly known by reason of his arrest that he was a forger, none seem to have been more astonished than these two of his misused friends. On the one hand, it may be said that one who misuses his friends indicates by his conduct unsoundness of mind, and an incapacity to distinguish right from wrong. On the other hand, such conduct may be said to indicate a purpose to have his will executed by his friends at whatever cost to them. It was peculiarly a question for the jury to determine what all this evidence signified respecting the mental capacity of Mr. Watson at the time of the acts in question in this case.

Upon a careful review we are unable to perceive that the evidence preponderates against the verdict, and the judgment of the trial court is affirmed.

Spitzer v. Knoxville Iron Co.

A. J. SPITZER v. KNOXVILLE IRON CO.*

*(Knoxville. September Term, 1915).***1. DEATH. Widow's compromise after administrator's appointment. Effect.**

A widow whose husband had been killed in defendant's mine through the defendant's negligence had the right to compromise the claim after she had waived her right to administer and after the plaintiff had actually qualified as administrator of the decedent, as her superior right to control the claim by compromising it or by bringing suit thereon herself could not be impaired by his qualification, but continued until she in some manner waived it, and as her waiver of the right to administer was not tantamount to a waiver of her prior right to sue or to compromise. (*Post*, pp. 220-222.)

Cases cited and approved: *Greenlee v. Railroad Co.*, 73 Tenn., 418; *Stephens v. Railway*, 78 Tenn., 448; *Webb v. Railway Co.*, 88 Tenn., 119; *Holder v. Railroad Co.*, 92 Tenn., 142; *Prater v. Marble Co.*, 105 Tenn., 496; *Railroad v. Acuff*, 92 Tenn., 348.

2. DEATH. Compromise by widow. Attack.

An attack upon the widow's compromise of an action against his employer for her husband's wrongful death on the ground of fraud practiced on her in procuring it could only be made by her, and could not be made by the administrator subsequently suing for the benefit of the widow and children. (*Post*, p. 222.)

FROM ANDERSON.

Appeal from the Criminal and Law Court of Anderson County.—VON A. HUFFAKER, Special Judge.

*On settlement of cause of action for death by beneficiaries without assent of executor or administrator see note in 35 L. R. A. (N. S.), 207.

Spitzer v. Knoxville Iron Co.

J. B. BURNETT, J. H. WALLACE, J. H. UNDERWOOD, O. W. WELLS and E. B. MADISON, for appellant.

SHIELDS & CATES and MITCHELL LONG, for appellee.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

A declaration was filed alleging the wrongful death of one H. A. Irish, in defendant's mine, through the culpable negligence of the latter. It was averred that the deceased left a widow, Elizabeth, and several children, for whose joint benefit the suit was brought. The defendant pleaded as matter of accord and satisfaction that prior to the bringing of the suit a full compromise of the claim had been effected with the widow, and her receipt taken, showing a full acquittance, a copy of which was set out in the plea. A replication was filed presenting two points: Firstly, that the compromise was obtained by fraudulently representing to the widow that it would affect only her individual right; secondly, that the compromise was made on August 30, 1912, notwithstanding the plaintiff had, prior to that time, been duly qualified as administrator of the estate, pursuant to the widow's waiver of her prior right to administer, and that these facts were well known to defendant when it made its compromise with the widow.

The defendant demurred to the first point on the ground that no one could question the settlement for fraud except the widow herself, or, at all events, the

Spitzer v. Knoxville Iron Co.

administrator could not question it acting alone, or otherwise than with the widow's joint action. This demurrer was sustained, and the court thereupon struck the whole replication from the file. The plaintiff then presented the second point alone in the form of an amended replication. The defendant moved to strike this replication on the ground that the widow had the prior and superior right to compromise the suit at any time before the administrator had brought his suit. The trial judge sustained this motion.

There was in the declaration a right of action asserted for the value of a mule belonging to the decedent, Irish, killed by the same negligence which cost the latter his own life. In addition to the plea of accord and satisfaction in respect of the claim for the wrongful death of Irish, the defendant filed a plea of the general issue to the whole declaration. After striking the replication the court proceeded to dispose of the case, by consent of parties without the intervention of a jury, with the result that he simply rendered judgment for the value of the mule, denying any relief for the death of Irish. This was equivalent to a judgment in favor of the defendant on the plea of accord and satisfaction; the fact of compromise with the widow not having been denied.

The only questions now before the court are: Firstly, whether the widow had the right to make the compromise after she had waived her right to administer, and the plaintiff had actually qualified as administrator of the deceased; secondly, whether the ad-

Spitzer v. Knoxville Iron Co.

ministrator could question the widow's compromise in the manner attempted.

We feel constrained to hold that the widow had the legal right to make the compromise. This seems to us a necessary consequence of our prior decisions construing the statutes. The substance of these decisions is that the widow's right of action is prior and superior to that of the administrator; that the latter cannot sue until she waives her right, albeit in addition to an express waiver she may effect a waiver by merely permitting his suit to stand without objection on her part; that she may compromise the demand at any time before the administrator, pursuant to her waiver, has brought a suit, but not afterwards; that likewise she may compromise the claim before suit brought, or after a suit brought by herself as widow at any time, regardless of the protest of her children; that after suit has been brought by the administrator the action can be compromised only by consent of the widow and children. *Greenlee v. Railroad Co.*, 5 Lea (73 Tenn.), 418; *Stephens v. Railway*, 10 Lea (78 Tenn.), 448; *Webb v. Railway Co.*, 88 Tenn., 119, 12 S. W., 428; *Holder v. Railroad Co.*, 92 Tenn., 142, 20 S. W., 537, 36 Am. St. Rep., 77; *Prater v. Marble Co.*, 105 Tenn., 496, 58 S. W., 1068; *Railroad v. Acuff*, 92 Tenn., 26, 20 S. W., 348.

It follows that it is immaterial that an administrator had been appointed before she effected the compromise. Nor is the result changed by the fact that she consented to the appointment of the administrator,

Spitzer v. Knoxville Iron Co.

waiving her prior right of administration. Her superior right to control the claim by compromising it, or by bringing suit on it herself, can be in no wise impaired by his qualification. Her superiority continues until she in some manner waives it. Her waiver of the right to administer is not tantamount to a waiver of her prior right to sue or to settle. Whether an unreasonable delay on her part would create a waiver or abandonment of her right is a question not presented in the facts before us.

It may be seen from some of our cases that this power bestowed on the widow has been in a few instances detrimental to her own interests, as well as to those of her children. A strong illustration may be found in *Stephens v. Railroad*, supra, wherein it appeared that the widow, acting with her second husband, compromised the right of action for a small sum, over the earnest and vigorous protest of the guardian of her children. Likewise in *Greenlee v. Railroad Co.*, supra, the compromise was effected by the widow over the opposition of her children. She is not required by law to give any bond, and it is thus perceived that the children's rights may not only be imperiled through her pressing need of money, her want of business judgment, the cajolment of a second husband, eager to obtain possession of the money, or the overpersuasion of ill-advised or interested friends, but likewise by her insolvency, and consequent inability to make good any losses sustained by the children through her

Spitzer v. Knoxville Iron Co.

improvidence or extravagance. The remedy, however, is with the legislature, not the courts.

As to the special form in which the administrator sought to avoid the compromise made by the widow, it suffices to say that the point is fully covered by the case of *Prater v. Marble Co.*, supra, in which it was held that an attack upon the widow's compromise on the ground of fraud practiced on her in procuring it could be made only by the widow; that the administrator, subsequently suing, could not make such attack.

C. ALLICE SALMON v. SOUTHERN RAILWAY COMPANY.*

(*Knorville*. September Term, 1915).

1. COMMERCE. Injury to servant engaged in superintendence.

A railroad employee at the shop of defendant railway, an interstate carrier, where it built and repaired cars used by intrastate and interstate commerce, and which at times were in no service at all, and where it painted its cars, the paint for which was brought in large quantities to its freight depot two miles from the shop, whence, after a carload had accumulated, it was hauled out to the shops, and the paint placed in a storehouse to be drawn for use, who had the superintendence of the unloading of the paint from the car, but nothing to do with its use, and who, among his general duties, looked after the issuance of the iron from the iron house to the various shops in the yard and superintended the unloading of iron and issuing it or pointing it out when called for, and who, after directing a number of men how to unload a car of paint, turned his back and was talking to another person about the iron when he was struck and fatally injured by a barrel of paint which slipped from the skid by reason of workman's negligence, was then engaged in superintending the unloading so far as that was interstate commerce. (*Post*, pp. 228, 229.)

2. COMMERCE. Employers' liability act. Railroad employee. "Interstate commerce."

Such employee, while directing the unloading of barrels of paint from the car, or while standing near talking with another person about a pile of iron, also within the scope of his duties, was not doing any act or duty having important connection with interstate commerce, and hence was not "engaged in interstate commerce" within the federal Employers' Liability Act April 22, 1908, ch. 149, 35 Stat., 65 (U. S. Comp. St. 1913, secs. 8657-8665), so as to entitle his widow to recover for his

*On the constitutionality, application and effect of Federal Employers' Liability Act see notes in 47 L. R. A. (N. S.), 38; L. R. A., 1915, ch. 47.

Salmon v. Southern Ry. Co.

death from the negligence of his fellow servants. (*Post*, pp. 229-237.)

Cases cited and distinguished: North Carolina R. Co. v. Zachary, 232 U. S., 248; Pedersen v. Delaware, etc., R. Co., 229 U. S., 146; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S., 156; North Carolina R. Co. v. Zachary, 232 U. S., 248; Illinois Central R. Co. v. Behrens, 233 U. S., 473; New York Cent. & Hudson R. Co. v. Carr, 238 U. S., 260; Illinois Cent. R. Co. v. Rogers, 221 Fed., 52.

FROM KNOX.

Appeal from the Circuit Court of Knox County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
VON A. HUFFAKER, Judge.

GREEN, WEBB & TATE, for plaintiff.

L. D. SMITH and ROSCOE WORD, for defendant.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

This action was brought to recover damages for an injury alleged to have been inflicted by the railway company upon plaintiff's husband, whereby the latter died. Originally there were three counts in the declaration, but only the first was relied upon.

This count alleges, in substance, that defendant railway company was engaged in interstate commerce, and while so engaged, and while her husband was em-

Salmon v. Southern Ry. Co.

ployed in such interstate commerce, as a servant of the defendant, he was injured through the negligence of his coemployees in the following manner: A car loaded with barrels of paint, or oil, was in course of unloading, the method being that the barrels were slid down a skid to the ground, two employees of the company being in the car and two on the ground, the business of the latter being to conduct the barrels safely to the ground, but by reason of their negligence the barrel turned and took the wrong direction, rolling rapidly to the ground and striking the deceased, by means of which act the injury was produced; that plaintiff's husband was directing the said employees, and had given proper instructions, but these were not complied with; that such direction was a part of deceased's duty, and it was also a part of his duty to have charge of the iron house and distribute the iron to the various parts of the system at Knoxville, to be used in the repair of cars.

The railway company filed a plea of not guilty, and, at the close of plaintiff's evidence, moved for a peremptory instruction. This was given by the trial judge. On appeal to the court of civil appeals that court affirmed the action of the trial judge, and the case is now before us under a petition for *certiorari*, and has been argued both orally and in writing.

It is insisted, in support of the motion for peremptory instructions, that there is no evidence that plaintiff's husband died because of the injury complained of; likewise, that there is no evidence of negligence on

the part of the coemployees of the deceased. We deem it unnecessary in this opinion to go into the particulars of this matter, inasmuch as our views were stated orally in the presence of counsel on both sides when the cause was decided. The view entertained by the court, and so stated, was that there was enough evidence on these two subjects to take the case to the jury, in the event the court should be of the opinion that the facts brought it within the federal Employers' Liability Act. We are of the opinion, however, that the judgment of the court of civil appeals must be affirmed on the ground that the facts did not make a case under that act. They are, in substance, as follows:

The Southern Railway Company is an interstate carrier, and maintains shops near Knoxville, Tennessee, called the "Coster Shops." At these shops, among other things, it builds and repairs cars which it uses both in intrastate and interstate commerce, and which at times are in no service at all. It uses paint at these shops in painting cars, houses, and buildings, but practically all of the paint is used on cars. The paint which it uses is bought in large quantities, and usually comes to the freight depot of the company about two miles from the shops, where it is accumulated until there is a carload; then the barrels of paint are loaded into a car and hauled out to the shops, where the car is unloaded and the paint placed in a storehouse, and from this storehouse the supply is drawn upon when needed in connection with the painting of cars, or buildings, or whatever use it may be put to.

Salmon v. Southern Ry. Co.

The evidence with respect to this particular barrel of paint does not show where it came from, or where it was to be placed, or what use it was to be put to. It is only inferable from the custom of the company with respect to paint generally that the particular barrel of paint which inflicted the injury would eventually be drawn upon for use in painting cars, buildings, etc.

Assuming that this particular barrel of paint, with the other barrels contained in the car, was handled in the usual and customary way, we may conclude that it was hauled from the depot at Knoxville out to the Coster Yards, where it was being unloaded, not for any particular use at that particular time, but for the purpose of being stored in the storehouse, from which subsequently a supply of paint necessary to be used in the shops would be drawn. There is no evidence from which it can be inferred that this particular barrel of paint was being devoted to any use at the time. We can only assume from the custom that the expectation was that it, at some future time, after it had gone into the storehouse, would be drawn upon for supplies. The connection of deceased with these transactions was to superintend the unloading of the paint from the car. He had nothing whatever to do with the using of the paint.

Among the general duties which the deceased had to perform was that of looking after the issuance of the iron from the iron racks in the iron house to the various shops in the yards; superintending the unloading of the iron; seeing that it was unloaded at the

Salmon v. Southern Ry. Co.

proper place, and placed properly in the racks, and issuing this iron, or pointing it out to the men working in the shops when it was called for. At the time the barrel of paint rolled down the skids and struck the deceased he had his back to the employees who were engaged in unloading the paint, was standing off some distance, looking at the pile of iron, and talking about it to some man whose name is not stated.

When this barrel of paint arrived at the yards, and had to be unloaded in order to be placed in the storehouse, the deceased called upon Mr. Reed, foreman of the scrap pile, to furnish him with four men to unload the car. Four negro laborers were furnished. They reported to deceased, who told them what to do and how to do it. Having done this, he turned his back in the manner stated, and was talking to the man about the iron, the latter being also, as stated, under his control and direction. It was the duty of the two employees who received the barrels from the hands of the other two in the car to conduct them safely to the ground along the surface of the skid. In order to do this it was necessary to seize the barrels firmly, but this particular barrel was, through the negligence of the two men on the ground, not firmly caught, and so escaped from their hands and ran down upon the deceased, striking him. An effort was made by one of the men on the car to save him, by calling to him, but the barrel went so rapidly, he did not have time to escape.

Two contentions are made by the railway company. The first is that at the time of the injury the deceased

Salmon v. Southern Ry. Co.

was not engaged in superintending the unloading of the paint from the car, nor in any act whatever connected with the distribution of the iron; that therefore, without reference to whether that work would constitute an act in interstate commerce, he was not at the time engaged in it, and for this reason cannot recover; secondly, that the work of unloading the paint in the manner in which this was being done, or superintending the iron pile, were not acts of interstate commerce.

We do not think the first contention is sound. He was close by, and had given directions which he had a right to suppose would be followed, and the fact that he turned away for a short time to talk with some one about the iron that was likewise under his charge we do not think would deprive him of his *status* of being engaged in an act of interstate commerce, if the work of unloading the paint was such an act. In our opinion the case, with respect to the first contention, falls within the authority of *North Carolina R. Co. v. Zachary*, 232 U. S., 248, 34 Sup. Ct., 305, 58 L. Ed., 591, Ann. Cas., 1914C, 159. In that case it appeared that the deceased had just finished inspecting, oiling, firing, and preparing his engine for a journey, which was part of an interstate trip, and, having done this work, he left the engine, and started to his boarding house. While so doing, and before he had crossed the track, he was struck by another engine and killed. The court said that there was nothing to indicate that this attempt to visit the boarding house was at all out of the ordinary, or was inconsistent with the servant's

Salmon v. Southern Ry. Co.

duty to his employer; that he was still on duty and employed in interstate commerce, notwithstanding his temporary absence from the locomotive engine. We are of the opinion, however, that the second contention of the defendant is sound, within the authority of *Pedersen v. Delaware, etc., R. Co.*, 229 U. S., 146, 33 Sup. Ct., 648, 57 L. Ed., 1125, Ann. Cas., 1914C, 153; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S., 156, 158, 33 Sup. Ct., 651, 57 L. Ed., 1129, 1133, Ann. Cas., 1914C, 156; *North Carolina R. Co. v. Zachary*, 232 U. S., 248, 256, 34 Sup. Ct., 305, 58 L. Ed., 591, 594, Ann. Cas., 1914C, 159; *Illinois Cent. R. Co. v. Behrens*, 233 U. S., 473, 34 Sup. Ct., 646, 58 L. Ed., 1051, 1055, Ann. Cas., 1914C, 163; *New York Cent. & Hudson R. Co. v. Carr*, 238 U. S., 260, 35 Sup. Ct., 780, 59 L. Ed., 1298 (year 1914); *Illinois Cent. R. Co. v. Rogers*, 221 Fed., 52, 136 C. C. A., 530.

The substance of these cases on the point under consideration is that there must be an immediate connection between interstate commerce and the act or duty in course of performance at the time the injury occurred. In the *Pedersen Case* the party injured and another employee, acting under the direction of the foreman, were conveying from a tool car to a bridge on an interstate railway some bolts, or rivets, which were to be used by them that night, or very early the next morning, in repairing the bridge, the repairs to consist in taking out an existing girder and inserting a new one. While on his way he was injured by a train on the same track. After pointing out that

Salmon v. Southern Ry. Co.

tracks and bridges are as indispensable to interstate commerce by railroads as are engines and cars, and that these instrumentalities must be kept in repair, since the security, expedition, and efficiency of that commerce depends, in large measure, upon this being done, the court continued:

“The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce.”

It is perceived that the connection between the act of the party injured and interstate commerce was close, since he was to use these bolts and rivets that very night, or early the next morning, in repairing the bridge. Here we have the materials devoted to a special part of one of the interstate agencies of the railway company, and a very brief time left in which the actual application was to be made.

In the *Scale Case* the facts recited in the opinion show that an interstate train had just arrived. The employee who was killed had imposed upon him the

Salmon v. Southern Ry. Co.

duty of taking the numbers of the cars and otherwise performing his duties in respect of them. While so engaged he was struck and fatally injured by a switch engine, which it was claimed was being negligently operated by other employees in the yard. The court said:

“In our opinion the evidence does not admit of any other view than that the case made by it was within the federal statute. The train from Oklahoma was not only an interstate train but was engaged in the movement of interstate freight, and the duty which the deceased was performing was connected with that movement, not indirectly or remotely, but directly and immediately.”

In the *Zachary Case* it appeared that the one injured had been ordered to go as fireman upon an engine which was to draw a train made up to complete an interstate haul. Preparatory to this trip he got the engine ready. After doing this he started to his boarding house, but was killed by a backing engine before he had crossed the main track. In disposing of the matter the court said:

“It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not, as yet, been attached to his engine, his employment in interstate commerce was still *in futuro*. It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate

Salmon v. Southern Ry. Co.

commerce, and the circumstances that the interstate freight cars had not, as yet, been coupled up is legally insignificant. . . . We conclude that with respect to the facts necessary to bring the case within the federal act, there was evidence that at least was sufficient to go to the jury."

It is perceived that in this case likewise the connection was very close.

In the *Carr Case* the evidence showed that a train was hauling both intrastate and interstate cars; that two intrastate cars were next to the engine; that on arriving at a point on the journey these two cars were detached from the train, pulled by the engine down the track, and then backed into a siding. It was the duty of one brakeman, O'Brien, to uncouple the air hose from the engine, and for the other brakeman, Carr, to set the hand brakes in order to prevent the two cars from rolling down upon the main track. By O'Brien's negligent management of the air hose, the sudden escape of air violently turned the wheel handle attached to the brake which Carr at the time was attempting to set. The wrench threw Carr to the ground, producing the injuries for which he sued. The court said:

"Plaintiff was a brakeman on an interstate train. As such, it was a part of his duty to assist in the switching, backing, and uncoupling of the two cars so that they might be left on a siding in order that the interstate train might proceed on its journey. In performing this duty it was necessary to set the brake of

Salmon v. Southern Ry. Co.

the car still attached to the interstate engine, so that, when uncoupled, the latter might return to the interstate train and proceed with it, with Carr and the other interstate employees, on its interstate journey.”

It is to be observed that in this case also the connection between the act by which the injury was received and interstate commerce was very close.

In *Behrens' Case*, the facts stated in the opinion of the court, so far as applicable to the present controversy, were these:

“At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the State. The question of law upon which the circuit court of appeals desires instruction is whether upon these facts it can be said that the intestate at the time of his fatal injury was employed in interstate commerce within the meaning of the Employers' Liability Act.”

In answering the question the court said:

“At the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expecting, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial

Salmon v. Southern Ry. Co.

under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

In disposing of the *Carr Case*, supra, the court distinguished it from the *Behrens Case* in the following language:

"The case is entirely different from that of *Illinois Cent. R. Co. v. Behrens*, 233 U. S., 473, 34 Sup. Ct., 646, 58 L. Ed., 1051, Ann. Cas., 1914C, 163, for there the train of empty cars was running between two points in the same State. The fact that they might soon thereafter be used in interstate business did not affect their intrastate *status* at the time of the injury; for, if the fact that a car had been recently engaged in interstate commerce, or was expected soon to be used in such commerce, brought them within the class of interstate vehicles, the effect would be to give every car on the line that character. Each case must be decided in the light of the particular facts, with a view of determining whether, at the time of the injury, the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof. Under these principles the plaintiff (Carr) is to be treated as having been employed in interstate commerce at the time of his injury."

These two cases present, in a strong light, the necessity of the close connection required between the interstate commerce and the act during the performance

Salmon v. Southern Ry. Co.

of which an injury complained of may have been received.

The *Rogers Case*, decided by the circuit court of appeals for the fifth circuit, bears a very close similarity in its facts to the case now before us. There the plaintiff was employed to maintain in good order the paint houses and shops, and to take care of all the paints, oils, varnishes, and other materials owned and used in painting and repairing the cars used by the railway company in its business as a common carrier in interstate commerce. At the time the plaintiff was injured he was at work next to the entrance of the paint shop near the railroad tracks, in the act of cleaning certain stencils used by the railway company to mark the cars employed by it in its interstate business. The court held that such cleaning of stencils was not a part of interstate commerce; that a contrary holding would unduly extend the doctrine announced by the supreme court of the United States in the *Pedersen Case*, *supra*.

The supreme court cases we have referred to in the order of their publication seem to show a progressive tendency towards requiring a closer and closer connection with some act of interstate commerce, or with the early repairing of some interstate agency. A lax construction would soon flood the docket of the supreme court with a vast number of cases from the State supreme courts; besides as we think, unduly curtail the operation of the laws of the several States,

Salmon v. Southern Ry. Co.

as regards actions to recover damages for injury or death caused by some wrongful act.

We are referred by counsel for the plaintiff to many decisions from State courts, and from the lower federal courts, showing a far more liberal construction of the act than we have held to be the true one under the supreme court decisions. These latter decisions are controlling, and, as we think, dispose of the question most wisely.

Comparing the facts of the present controversy with the supreme court cases we have cited, it is apparent that the act of unloading the paint was not connected with interstate commerce with sufficient immediateness to bring the case within the federal act. The paint was to be used on cars, designed both for interstate and intrastate service, but how soon this use was to be made does not appear. The paint was simply stored to be used when needed. It is not shown whether any need developed within a week or a month, or at all.

On the ground stated we are of the opinion that the judgment of the court of civil appeals, sustaining the defendant's motion for a peremptory instruction in the trial court, must be affirmed.

Shipp v. Belt Ry. Co.

SHIPP *et ux.* v. BELT RAILWAY COMPANY *et al.*

(Knoxville. September Term, 1915.)

1. RAILROADS. Farm crossings. Construction. Jurisdiction.

The chancery court has jurisdiction to compel a railroad company to make a grade crossing to allow an owner of land on both sides of the track to pass from one side to the other. (*Post*, p. 242.)

Code cited and construed: Sec. 2419 (S.).

2. RAILROADS. Farm crossings. Statutory provisions.

Shannon's Code, sec. 2419, providing that when land on both sides of a track is owned by the same proprietor, convenient crossings shall be made and kept up at the expense of the corporation, covers crossings over railroad lines together with side tracks, spur tracks, and switch yards. (*Post*, pp. 242, 243.)

Case cited and distinguished: *Chalcraft v. Railroad Co.*, 113 Ill., 88.

3. RAILROADS. Farm crossings. Right to maintain.

Where a proprietor owns land on both sides of a railroad track, no crossing will be ordered at a point which would directly and materially imperil the safety of transportation, the rights of the public being paramount to those of the individual. (*Post*, p. 243.)

4. RAILROADS. Crossings. Expense of construction.

Where a proprietor owns land on both sides of a railroad track, a crossing will not be ordered constructed at a point where the cost of construction and maintenance will be out of all proportion to the benefits. (*Post*, pp. 243, 244.)

5. RAILROADS. Crossings. Rights of owner. Estoppel.

An owner of land on both sides of a railroad track, who conveyed an additional strip for a right of way for switch tracks, can-

Shipp v. Belt Ry. Co.

not, after having had the land reconveyed to him, compel the railroad company to construct a crossing where no provision therefor was made in the conveyance. (*Post*, pp. 244-246.)

FROM HAMILTON.

APPEAL from the Chancery Court of Hamilton County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
T. M. McCONNELL, Chancellor.

COOK & NOLL, for complainants.

SHEPHERD, FLEMING & SHEPHERD, for defendants.

MR. SPECIAL JUSTICE FRANTZ delivered the opinion of the Court.

The original bill in this cause was filed in the chancery court of Hamilton county, Tennessee, for the purpose of having established a crossing over the right of way of the defendant from one portion of the property of the complainants lying on one side of the railway to an eighteen acre tract of land belonging to the complainants lying upon the opposite side of same; convenient access to which has been cut off by the construction of a switch yard by the railway company upon the right of way acquired in the manner presently to be set out.

On the 14th day of May, 1884, J. S. Shipp and others, being tenants in common of a tract of land lying adja-

Shipp v. Belt Ry. Co.

cent to the city of Chattanooga, conveyed to the Union Railway Company and its successors and assigns a strip of land fifty feet wide through said tract for the purpose of constructing and maintaining thereon a railroad with one or more tracks upon the same. The railway company built its line upon said right of way thus acquired, and operated its trains over the same, and thereafter the Belt Railway Company, defendant herein, became the successor in title to said property.

In 1886 the said tract of land was partitioned, and a tract of land containing fifty-eight acres, which is now involved, was acquired by J. F. Shipp.

On the 26th day of May, 1900, J. F. Shipp and wife conveyed this tract of land by general warranty deed to George W. Davenport.

On the 20th day of October 1906, George W. Davenport and wife joined with J. F. Shipp and wife in the execution of a general warranty deed to the Georgia Industrial Realty Company, of a sufficient amount of land to make a strip two hundred and six feet wide through said tract of land, excepting from this conveyance the lands previously conveyed to the Belt Railway, the consideration for this conveyance being \$2,500. This conveyance was without reservation.

Thereafter the land excepting the above conveyance was reconveyed by Davenport to Mrs. J. F. Shipp, and thereafter the Georgia Industrial Realty Company conveyed the aforesaid strip of land to the defendant Belt Railway Company, which thereupon proceeded to

Shipp v. Belt Ry. Co.

construct a switch yard containing some ten or twelve tracks over and upon the same.

The bill in this case seeks to establish a crossing over and through this switch yard. The chancellor granted the complainants the relief asked by ordering the construction of a grade crossing through the property in question, and referred the case to the master to ascertain the amount of damages accruing to complainants for loss of rents and profits by reason of being cut off from said eighteen-acre tract, and damages accruing to them on account of the use of said lands for a switch yard.

Upon appeal the court of civil appeals affirmed the chancellor to the extent of allowing and ordering the crossing to complainants, but reversed the chancellor with respect to the allowance of damages.

Both parties have brought the cause to this court by *certiorari* for review.

On the part of the complainant it is insisted that they are entitled to this crossing by reason of the provision of Shannon's Code, sec. 2419, as follows:

"When land on both sides of a track is owned by the same proprietor, convenient crossing shall be made and kept up at the expense of the corporation for the use of said proprietor, and all necessary cowgaps made."

It is further contended that they are entitled to such crossing as a way of necessity, and also by reason of the fact that they had been promised a crossing.

We may dispose of the proposition that they had been promised a crossing by the statement that the proof does not establish such promise.

Shipp v. Belt Ry. Co.

It is objected that the chancery court is without jurisdiction to grant the relief sought. The point is not well taken. If complainants are entitled to the crossing, clearly the right may be enforced in equity, and the court of equity, having taken jurisdiction for one purpose, will retain it for the settlement of the entire controversy between the parties.

It is contended on behalf of the defendant railway company that the statute above referred to has no application to switch yards, but refers only to the ordinary railway line extending through tracts of land. This question seems to be one of first impression in this state.

It will be observed that our statute is a broad one and, in our opinion, is not meant simply to cover a farm crossing over the main line of a railroad, but to cover crossings over said line or lines together with side tracks, spur tracks, and switch yards where the same may be done within the principles hereinafter laid down.

In dealing with an analogous question arising under a similar statute the supreme court of Illinois, in the case of *Chalcraft v. Railroad Company*, 113 Ill., 88, said:

“In giving construction to the statute, it is quite evident it could not have been intended the interests of the landowner or occupant are alone to be consulted, for the question also affects the interests of the railroad company and the public. It would not be reasonable to suppose that it was contemplated that a rail-

Shipp v. Belt Ry. Co.

road company should be compelled to erect and maintain a crossing at a point where the expenses of so doing would be very greatly in excess of all benefits that could result therefrom to the landowner or occupant. Moreover, the rule is general that where a conflict arises between a mere private convenience on the one side and the public welfare on the other, and one must give way, the former must yield to the latter. The public welfare demands as high a degree of safety in the transportation of persons and property by railroad as is reasonably attainable in view of the character and exigencies of that mode of transportation, and anything, therefore, which tends to directly and materially imperil the safety of such transportation, is so far inconsistent with the public welfare, and ought not to be allowed for the mere sake of a private convenience."

We agree with the principles laid down by that court. No crossing will be required or allowed at a point which would tend to directly and materially imperil the safety of transportation, for where the rights of the individual come in conflict with those of the public, the rights of the individual must yield.

Neither will a crossing be allowed at a point where the expense of constructing and maintaining the same will be out of all proportion to the benefits arising to the property owner.

The proof in this case tends strongly to show that the construction and maintenance of a crossing such as is contended for by the complainants and allowed by the lower courts would be destructive of the rights of the

Shipp v. Belt Ry. Co.

railroad company, its use dangerous to the property owner, and probably detrimental to the public interests.

A switch yard is not only a necessary and proper corporate use, but is a necessary public use in the operation of railroads, and where land has been acquired by the railroad company as in the present case, such use will be held to be within the reasonable contemplation of the parties.

What we have said with respect to the limitation of rights arising under the crossing statute applies more strongly to the way of necessity sought to be acquired if, indeed, a way of necessity arises in such a case.

The complainant is precluded, however, in this case by its peculiar facts. When the original strip of land was conveyed to the railroad company undoubtedly the right to a crossing was reserved in the property owner by the terms of this statute and possibly a way of necessity arose independent of statute. However, when the property owner has conveyed through the realty company to the railway company, a strip of land on either side of said right of way, in fee, of a sufficient amount of land to make a total strip of two hundred and six feet wide, such conveyance being by warranty deed without any reservation of such crossing, we hold that he is thereafter estopped by the terms of his deed to claim it.

In other words, when the original conveyance of right of way was made to the Union Railway Company, the right to a crossing thereof, both under the statute

Shipp v. Belt Ry. Co.

and at common law, immediately arose and became appurtenant to the contiguous land, and when such contiguous land on both sides of this railway was thereafter conveyed by warranty deed without any reservation of such right, it passed to the grantee under the deed, and through it to the railway company, for whom it was admittedly acting.

It is conceded that at the time of the acquisition of this additional land the railway company did not have the power to condemn lands for this character of switch yards. This does not mean, however, that switch yards are not regarded as a legitimate public use, but is upon the theory that they are of such a nature that they are not necessarily to be placed at any particular location.

Not only is this true, but the Railway Company did not have the power to condemn even for its main line, sidetracks and spurs a strip of land as wide as that thus acquired by purchase.

Although the railway company was not authorized to condemn lands for the purposes and to the extent thus acquired, it not only had the right to do so, but it was its duty to acquire lands adequate for this purpose at this or some other appropriate point, to the end that it might adequately perform its public duties.

The fact that it did thus by purchase acquire lands in excess of the width which the statute allowed it to condemn, taken with the fact that it acquired the lands in fee, was sufficient notice to the property owner that they might be used for such corporate purposes as these lands were afterwards put to.

If the property owner therefore desired to reserve to himself the crossing to which he was already entitled, and which had become appurtenant to the land

Shipp v. Belt Ry. Co.

thus previously conveyed, he should have reserved it to himself by appropriate reservation in his deed of conveyance.

It results that the decree of the court of civil appeals is reversed, and the case is dismissed.

Preston v. Moore.

GEORGE K. PRESTON v. E. L. MOORE.*

(*Knoxville*. September Term, 1915.)

1. TRUSTS. Constructive trusts. Misappropriation of property.

Where defendant, a salesman employed in complainant's mercantile establishment, appropriated to his own use merchandise and money belonging to complainant, and purchased and improved real property therewith, complainant was entitled to look to such real property as being held under a constructive trust, the absence of the conventional relation of trustee and *cestui que trust* being no obstacle to the granting of equitable relief, and the facts showing, if such showing was necessary, that full trust and confidence and ample power over the receipt and handling of funds and merchandise were given defendant by complainant. (*Post*, pp. 249-255.)

Cases cited and approved: *Union Bank v. Baker*, 27 Tenn., 447; *Edwards v. Culberson*, 111 N. C., 342; *Pascoag Bank v. Hunt*, 3 Edw. Ch., 583; *Bank of America v. Pollock*, 4 Edw. Ch., 215.

Cases cited and distinguished: *Campbell v. Drake*, 39 N. C., 94; *Newton v. Porter*, 69 N. Y., 133; *Riehl v. Evansville Foundry Association*, 104 Ind., 70.

2. HOMESTEAD. Exception from exemption. Constructive trusts. Misappropriation of property.

A person, who, by reason of the misappropriation of another's property and investment thereof in real estate, was a trustee *ex maleficio* for the person whose property was appropriated, was not entitled to a homestead in such real estate as against the *cestui que trust*. (*Post*, pp. 255, 256.)

Case cited and approved: *Gordon v. English*, 71 Tenn., 634.

FROM KNOX.

*On existence of trust in property stolen or embezzled see note in L. R. A., 1914B, 442.

Preston v. Moore.

APPEAL from the Chancery Court of Knox County.
—R. H. SANSOM, Special Chancellor.

A. C. GRIMM, for appellant.

FOWLER & FOWLER, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

In this cause the special chancellor decreed that Moore, while in the employ of complainant Preston as a salesman in the mercantile establishment of the latter, in violation of the trust and confidence reposed in him and in disregard of his duties as such employee, wrongfully and without knowledge or consent of complainant appropriated to his own use merchandise and money belonging to complainant to the value of \$1715.56; and that out of same defendant purchased a certain lot and improved it by erecting thereon a dwelling house, barn, etc. In this finding we concur, after an examination of the record. We hold that the realty was purchased and improved by the use of funds thus appropriated.

The complainant, thus having traced or followed the fund wrongfully diverted into the real estate, contended below, and insists here, that he is entitled to have the realty subjected to the satisfaction of his demand, as representing, under the doctrine of resulting trusts or of constructive trusts in the nature of a resulting trust, the funds of complainant which produced the same.

Preston v. Moore.

The lower court held that defendant Moore was entitled to a homestead in the realty so acquired, and complainant assigns that ruling as error.

The first question, therefore, for solution is whether complainant may be permitted by equity to follow the funds so appropriated into the realty.

The counsel of defendant on this phase of the case contend that a resulting trust cannot arise out of a transaction that is felonious in character. The early case of *Union Bank v. Baker*, 8 Humph (27 Tenn.), 447, is relied on. In that case it appeared that a large amount of the notes of the bank had been stolen from its vaults, a considerable portion of which came into the possession of Baker, who at the time knew them to have been stolen, and the effort of the bank was to trace the notes, through an investment in whisky, into realty as the ultimate investment, and the court, in passing on the question, said that a trust could not be created out of such a felony; that it would be a new principle to hold every thief a trustee by construction for the owner of the effects stolen, and to allow the true owner to pursue them in chancery through their changes in form. But the real ruling adverse to the bank in that case was that the trust fund could not be traced into and beyond property perishable in nature, such as whisky. The court placed its *dictum* that a felonious transaction may not be made the basis of a constructive trust on the authority of the case of *Campbell v. Drake*, 39 N. C. (4 Ired. Eq.), 94, where it was held that when a clerk in a store pilfered money and

Preston v. Moore.

goods from his employers, and laid out the proceeds in the purchase of a tract of land, the person thus wronged could not hold the clerk as trustee for his benefit. It should be noted, however, that the supreme court of North Carolina, in *Edwards v. Culberson*, 111 N. C. 342, 16 S. E., 233, 18 L. R. A., 204, examined the case of *Campbell v. Drake*, and demonstrated clearly that the modern rule is not in accord with what was thus said in the earlier case. Seizing on a passing remark of the judge who delivered the opinion in *Campbell v. Drake* to the effect that the complainant might "have the land declared liable as a security for the money laid out for it," Chief Justice SHEPHERD in the later case said:

"It was not stated upon what principle this could be done, but we apprehend that it was based upon the general proposition that whenever a person has obtained the property of another by fraud, he is a trustee *ex maleficio* for the person so defrauded for the purpose of recompense or indemnity. 'One of the most common cases,' remarks Judge STORY, 'in which a court of equity acts upon the ground of implied trusts, *in invitum*, is when a party receives money which he cannot conscientiously withhold from another party.' STORY, Eq. Jur., sec. 1255."

The North Carolina court then proceeded to hold what on this record we are not called on by the facts of this case to rule:

"A confidential relation is not necessary to establish such trust, and there is no good reason why the owner

Preston v. Moore.

of property taken and converted by one who has no right to its possession should be less favorably situated in a court of equity, in respect to his remedy (at least for the purpose of 'recompense or indemnity'), than one who by an abuse of trust has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. . . . The trusts of which we are speaking are not what is known as 'technical trusts' and the ground of relief in such cases is, strictly speaking, fraud, and not trust. Equity declares the trust in order that it may lay its hand upon the thing and wrest it from the possession of the wrongdoer. This principle is distinctly recognized by our leading text-writers, and it is said by Mr. Bispham (Eq. 92) that 'equity makes use of the machinery of a trust for the purpose of affording redress in cases of fraud.' The principles above stated are illustrated by many decisions to be found in the reports of other states, and as our case may easily be assimilated to those in which money or other property has been stolen and converted, such cases must be recognized as pertinent authority in the present investigation."

The attempt to establish the doctrine thus combated met the same fate in the courts of New York. In *Pascoag Bank v. Hunt*, 3 Edw. Ch., 583, it was held that a felon could not by implication be made a trustee, but the authority of the case was almost immediately undermined by *Bank of America v. Pollock*, 4 Edw. Ch., 215; and in *Newton v. Porter*, 69 N. Y., 133, 25 Am. Rep., 152, it was said:

Preston v. Moore.

“It is insisted by counsel for the defendants that the doctrine which subjects property acquired by the fraudulent misuse of trust moneys by a trustee to the influence of the trust, and converts it into trust property and the wrongdoer into a trustee at the election of the beneficiary, has no application to a case where money or property acquired by felony has been converted into other property. There is, it is said, in such cases, no trust relation between the owner of the stolen property and the thief, and the law will not imply one for the purpose of subjecting the avails of the stolen property to the claim of the owner. It would seem to be an anomaly in the law, if the owner who has been deprived of his property by a larceny should be less favorably situated in a court of equity, in respect to his remedy to recover it, or the property into which it had been converted, than one who, by an abuse of trust, has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. The law in such a case will raise a trust *in invitum* out of the transaction, for the very purpose of subjecting the substituted property to the purpose of indemnity and recompense. . . .

“We are of opinion that the absence of the conventional relation of trustee and *cestui que trust* between the plaintiff and the Warners is no obstacle to giving the plaintiff the benefit of the notes and mortgage, or the proceeds in part of the stolen bonds. See *Bank of America v. Pollock*, 4 Edw. Ch., 215.”

Preston v. Moore.

In a case involving a bookkeeper or salesman who had embezzled funds and invested same in real estate, causing title to be taken in his wife, *Riehl v. Evansville, Foundry Association*, 104 Ind., 70, 3 N. E., 633, it was said:

“A bookkeeper or salesman, who receives the money of his employer by virtue of his employment, does receive it in a fiduciary capacity, and if he fraudulently appropriates it to his own use, he is guilty of a breach of trust. The funds which come into the hands of an agent for his principal are trust funds, and the latter, as the beneficiary, becomes in equity the owner of the property purchased by the agent with these funds. Where one occupies the position of a trustee, either by express appointment or by implication of law, and wrongfully uses the money received by him as trustee in the purchase of property, the beneficiary may follow it into the property. . . .

“Cases are cited holding that where an agent embezzles money from his employer and invests it in property, the principal cannot follow the trust into the property, because the remedy against the agent is by a criminal prosecution. *Campbell v. Drake*, 4 Ired. Eq. (39 N. C.), 94; *Pascoag Bank v. Hunt*, 3 Edw. Ch., 583.

“We have no doubt that these cases were not well decided. They are in conflict with the very great weight of authority, and are unsound in principle. The fact that the agent may be criminally prosecuted does not affect the right of the principal to get back his

Preston v. Moore.

money. With quite as much reason might it be urged that the principal could not take from the embezzler the money, if found on his person, because he can be punished by a criminal prosecution, as to urge that the principal cannot follow the trust because the embezzler is liable to be punished by a prosecution at the instance of the state. There is no conceivable reason why the wronged employer may not secure his money and the embezzler be also punished. The punishment is not to vindiate or reward the principal but to protect the community from the criminal acts of embezzlers.”

In *Perry on Trusts*, sec. 217, of the later New York rule, it is said:

“This would seem to be the better opinion, as the clerk certainly holds a confidential relation to his employer.

“In *Newton v. Porter*, it was held that the owners of the proceeds of stolen property might be charged as trustees for the owner, and there would seem to be no principle to the contrary. It may depend, however, upon the extent to which the clerk is trusted.”

See, also, *Pom. Eq. Jur.*, 1053; 1 *Beach, Mod. Eq. Jur.*, sec. 281.

If the limitation suggested in the last quotation were accepted as sound, then under the facts of this case we would be compelled to hold that full trust and confidence and ample power over the receipt and handling of funds and merchandise were given Moore by his employer, to whose trust he proved recreant.

Preston v. Moore.

We therefore hold that the complainant may look to the property which was the product of the speculations for indemnity, as being held under a constructive trust. The absence of the conventional relation of trustee and *cestui que* between the parties is no obstacle to the granting of equitable relief.

May a trustee *ex maleficio* prevail upon a claim to right of homestead in the realty produced by the avails of his fraud on the *cestui que trust*, against the latter, when the fund is followed into the realty?

An affirmative response would shock one's sense of what is equitable, and it is not the response the law gives.

Thompson in his work on Homestead, sec. 338, says:

"If B. has purchased a homestead with the money of A., under such circumstances as would make him a resulting trustee for A., of course he can assert no right to homestead as against A., since in the eye of a court of equity, A. is the owner of the property, and not B."

This court in *Gordon v. English*, 3 Lea (71 Tenn.), 634, referred to the text of Mr. Thompson with approval, and held that not only in cases of resulting trust proper, but also in a case which involved "a trust which has all the qualities and effects of a resulting trust proper" was the rule applicable. The wrongdoer, it was there said, "cannot acquire a homestead right as against the person whose money has been used. The money due the beneficiary is in reality purchase

Preston v. Moore.

money, against which the homestead exemption cannot prevail.”

The learned special chancellor erred in decreeing to the contrary on the last points. Modified and affirmed, with remand for further proceedings consistent with what is herein ruled.

Westborne Coal Co. v. Willoughby.

WESTBORNE COAL CO. *et al.* v. G. W. WILLOUGHBY.

(*Knoxville*. September Term, 1915.)

1. MASTER AND SERVANT. Injuries to servant. Relation. License.

A servant who is temporarily laid off, and goes upon his master's premises to assist another servant in getting his tools is not "employed," but is a mere licensee, so that his administrator cannot recover for his death except upon a showing of willful or malicious injury. (*Post*, pp. 261-263.)

Cases cited and approved: *White v. Railroad*, 108 Tenn., 739; *Railroad v. Meacham*, 91 Tenn., 428.

2. NEGLIGENCE. New dangers. Duty.

Where a licensee is injured by a sudden or new peril, the owner of the premises is under duty to warn him of the danger if he has notice of it. (*Post*, pp. 263-265.)

Cases cited and approved: *Ellsworth v. Metheney*, 104 Fed., 119; *Felton v. Aubrey*, 20 C. C. A., 436; *Railroad v. Fain*, 80 Tenn., 35; *Fleming v. Railroad*, 106 Tenn., 374; *Trivette v. Railroad*, 212 Fed., 641; *Murch v. Johnson*, 203 Fed., 1.

Case cited and distinguished: *Escabana Mfg. Co. v. O'Donnell*, 212 Fed., 648.

3. NEGLIGENCE. Active negligence. Duties to licensees.

There is no duty to a licensee upon a landowner over whose property he has been accustomed to go, to arrange his property to safeguard the licensee his only duty being to give timely warning of danger, and to do no act willfully to injure the licensee. (*Post*, pp. 265-267.)

Cases cited and approved: *O'Brien v. Union Freight R. Co.*, 36 L. R. A. (N. S.), 492; *Louisville, etc., R. R. Co. v. Bryan*, 107 Ind., 51; *Williams v. Nashville*, 106 Tenn., 533.

Westborne Coal Co. v. Willoughby.

4. NEGLIGENCE. Licensees. Custom.

The owner of a business may, as to licensees, operate it in the customary way, though that be negligent, unless he knows that they may be injured by his negligence, or are in danger, or by their habits may become endangered. (*Post*, pp. 267, 268.)

Cases cited and approved: *Indian Refining Co. v. Mobley*, 134 Ky., 822; *Batchelor v. Fortescue*, L. R., 11 Q. B. Div., 474; *Larmore v. Crown Point Iron Co.*, 101 N. Y., 391; *Weltzmann v. Barber Asphalt Co.*, 190 N. Y., 452.

5. NEGLIGENCE. "Active negligence." What constitutes.

Active negligence includes all inadvertent acts causing injury to others, resulting from failure to exercise ordinary care, and all acts the effects of which are unforeseen through want of proper attention. (*Post*, p. 268.)

FROM CAMPBELL.

APPEAL from the Criminal and Law Court of Campbell County.—XEN HICKS, Judge.

PICKLE, TURNER & KENNERLY and JESSE L. ROGERS,
for appellant.

CORNICK, FRANTZ, McCONNELL & SEYMOUR and L. H.
CARLOCK, for appellees.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

This action was brought to recover damages for the alleged wrongful death of James Willoughby. There was a judgment for \$3,000 damages in the criminal and law court of Campbell county, from which an appeal

Westborne Coal Co. v. Willoughby.

was prayed to the court of civil appeals. That court held that the trial court should have sustained the plaintiff in error's motion for peremptory instructions, and accordingly dismissed the suit. The case was then brought here by the writ of *certiorari*.

We think the court of civil appeals reached the correct conclusion. The intestate had been for some time in the employ of the plaintiff in error, but, on the day he was killed, he was not at work, and, while spending his time at the sandhouse of the company, was killed by an explosion of powder in course of conveyance to the mines on one of the coal cars.

The sandhouse, or shed, was a small structure wherein sand was dumped for the purpose of being dried in a stove, through the agency of a boy, whose business it was to dry this sand, and furnish it to the electric motor, which was used in hauling the cars, to enable it to ascend grades. It was also this boy's duty to see that the track at the sandhouse was kept free of sand.

On the day in question, about seven o'clock in the morning, some fifteen or sixteen employees of plaintiff in error, in addition to the intestate and one Fred Keplinger, had assembled at the sandhouse, ostensibly for the purpose of going down on what was known as a "trip" train to one of the mines. This trip train was accustomed to taking miners if they applied for transportation by seven o'clock, either at the sandhouse, or some other suitable place on the line. Keplinger, like the intestate, was not working that day, but his purpose was to go into a mine and remove his tools that

Westborne Coal Co. v. Willoughby.

were in danger of being swamped by water. He had persuaded intestate to go with him. Why Keplinger and the intestate did not go does not appear. Most of the other persons who had assembled went to the mines. Keplinger, and the intestate, with four or five others, lingered at the sandhouse. While they were there, one of the foremen, Hughes, was also present and talked with the intestate. No objection seems to have been made to the presence of Keplinger and the intestate. We infer that before the accident occurred Hughes had left the sandhouse; however, about six persons were still there.

Shortly before eight o'clock Mr. Boone, another mine foreman, instructed Floyd Tugles and Pat Berry to load a car with cans of powder to be taken to the mine for use there. The place where the powder was loaded was about fifty yards from the sandhouse. The car had running through it a metal bar, which was attached to the motor when ready to be drawn by the latter. Some of the powder was in wooden buckets and some in metal cans. These were placed indiscriminately in the bottom of the car, some of the metal cans being placed on the metal bar. When the load had been completed, the motor proceeded along the track towards the mine, but when it reached the sandhouse two of the cans of powder exploded, resulting in the killing of the intestate and the wounding of several others of the six present.

What caused the explosion is unknown. An electrical expert was examined, who testified that if the mo-

Westborne Coal Co. v. Willoughby.

tor, by means of intervening sand on the track, lost contact with the rails, the electricity which had been fed to the motor by the trolley would seek its return to the power house through all of the metal of the attached car, including the metal bar previously mentioned, and in that way would go through the metal wheels of the car and thence back along the track to the power house. He testified that if the isolation of the motor by the sand had occurred, this would be an adequate cause for the explosion by means of the electricity running along the bar, thence to the metal cans, cutting a hole in them, and in that manner setting the powder off.

There is one fact, however, which seems to us an insuperable objection to the suggested solution of the accident; that is, there is no evidence that there was on the track a sufficient quantity of sand to isolate the motor. The evidence simply is that there was sand on the track; how much does not appear. It seems singular also that only two of the cans were exploded. There is no evidence of any hole in the bottom, or other part of either can; possibly, however, this could not have been ascertained after the explosion.

It thus failing to affirmatively appear that there was sufficient sand on the track to effect the result mentioned, it seems this theory of the accident must fail, and there is no other.

However, let us assume that there was sufficient sand for the purpose; still, we think the result would be the same. The intestate was at the sandhouse, not

Westborne Coal Co. v. Willoughby.

as an employee of the company, since he was not working that day, but for his own purposes, that is, to aid his friend Keplinger, who likewise was not at work. They both, therefore, were mere licensees. The duty of the plaintiff in error to them was simply not to wantonly or intentionally injure them. It is true, as we believe, that if the person in control of the motor knew that there was enough sand on the track at the sandhouse to produce a short circuit, and that dispatching the motor with the powder-laden car would probably produce the result which was caused, the death or injury of the intestate, then the act of sending the motor and the car by the sandhouse under such circumstances would have been such a gross act of negligence as would amount to wantonness, and the equivalent of willful injury. But, before the plaintiff in error could be held liable for such a result on the hypothesis previously stated, we should have to assume that it was its duty, to the licensees, through its servants, to inspect the track before proceeding, and there would also have to be imputed to them knowledge of the fact that the short circuiting would produce the result that is alleged to have taken place; that is, the ignition of the powder by means of the transference of the current from the motor to the car drawn by it. It does not appear that such a phenomenon had ever before occurred at the mines; or that any of defendant's servants had any reason to suspect that such a result might occur from running the motor over said waste left upon the track at the sandhouse. Let it

Westborne Coal Co. v. Willoughby.

be assumed, though not decided, that the plaintiff in error would be liable to one of its invitees as for negligence on account of an occurrence such as is alleged to have happened, through the direction of its foreman Boone, in ordering the car to be loaded, knowing that it would be transported in the manner stated, and in not having the track inspected at the point where it passed by the sandhouse for the purpose of ascertaining whether it was incumbered with sand; still, this negligence would not be such as would make the plaintiff in error liable to a licensee, because it would be only an inadvertence, a want of care. It would not be an absence of care in a matter so obvious as to indicate the certainty or great probability of danger. *White v. Railroad*, 108 Tenn., 739, 70 S. W., 1030; *Railroad v. Meacham*, 91 Tenn., 428, 19 S. W., 232.

Counsel for defendant in error insists that the plaintiff in error was guilty of what is called active negligence, as distinguishable from passive negligence, and that in such a case there is liability to a licensee. We are referred to the cases of *Ellsworth v. Metheney* (C. C. A. Sixth Circuit), 104 Fed., 119, 44 C. C. A., 484, 51 L. R. A., 389, and *Felton v. Aubrey*, 20 C. C. A., 436, 74 Fed., 350. The latter case is the one that discusses the theory of active negligence as affects the duty of one towards a licensee. The court, however, in that case, was considering the duty of a receiver operating a railroad to have his servants look out for people on the track at a place where, under an implied license, they might be expected to walk or congregate.

Westborne Coal Co. v. Willoughby.

It was no more than the question considered by this court in the case of *Railroad v. Fain*, 12 Lea (80 Tenn.), 35, and *Fleming v. Railroad*, 22 Pick. (106 Tenn.), 374, 61 S. W., 58. The *Felton Case* just referred to was quoted with approval in *Ellsworth v. Metheney*, supra, and there applied to the case of an electric wire which, unknown to the employee killed, had been strung along the side of a dark mine entry with the wires exposed, resulting in his death when he unconsciously touched it on his return from a visit at the noon, or rest, hour to the room of one of his fellow miners. This case was referred to with approval in *Trivette v. Chesapeake & Ohio R. Co.* (C. C. A. Sixth Circuit), 212 Fed., 641, 129 C. C. A., 177, and applied to a case similar in its facts to those in *Felton v. Aubrey*. It is also approved in *Escabana Mfg. Co. v. O'Donnell*, 212 Fed., page 648, 129 C. C. A., 184, and there applied to the case of a child of nine years accustomed to gather chips near an ash pile and to play there. Shortly before the child was injured hot ashes had been thrown upon the pile; and it was held in substance that, knowing the habits of the child, and the danger, it was the duty of the plaintiff in error to give notice. A short excerpt from the opinion will make this point a little clearer. Said the court:

“It is true that the danger from the hot ashes was not a new peril in exactly the same sense as the danger involved in *Ellsworth v. Metheney*, or *Murch v. Johnson*, 203 Fed., 1 (121 C. C. A., 353); but we see no satisfactory distinction in principle. A similar danger

Westborne Coal Co. v. Willoughby.

had been created and had passed away the day before, and so of each prior day; but yet the danger which did the harm was temporary, it would not have existed at the moment of injury, unless it had been newly created; and, when we come to consider such a situation with reference to children customarily permitted to play on the ash pile, we are satisfied that, in the language of Judge Day, 'sound morals and just treatment demand that the licensee shall have notice of the new danger which he is likely to encounter in using the premises.' "

It is perceived that in each one of these instances the party sought to be held liable had full knowledge of the new peril imposed upon the licensee. The duty required by this fact was to give timely notice to the party in danger.

This subject of active negligence, as related to the duty of a trespasser, or bare licensee, is discussed with an extensive citation of authorities in a note to *O'Brien v. Union Freight R. Co.*, 36 L. R. A. (N. S.), 492-503. It is perceived from the *O'Brien Case* itself that the Massachusetts court seems to have finally repudiated the general doctrine, after having apparently followed it through a series of cases. In our judgment there is no necessity for the distinction between active and passive negligence as applied to the subject we are considering. Such cases can be resolved on the general theory of the duty of the landowner, or other person on whose premises the licensee happens to be, to warn the licensee of any new danger caused by such landowner or such other person after such licensee comes

Westborne Coal Co. v. Willoughby.

upon his premises, and to forbear committing any act against such person which would amount to willful injury, or to abstain from doing any act under such circumstances of crass negligence as would be equivalent to a malicious or willful injury showing a recklessness or disregard of human life tantamount to the state of mind entertained by one accomplishing a willful and unjustifiable injury upon the person of another. "To constitute a willful injury," it has been said, "the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. It involves conduct which is *quasi* criminal. . . ." *Louisville, N. H. & Chicago R. R. Co. v. Bryan*, 107 Ind., 51, 7 N. E., 837. Quoted with approval in *Railroad v. Roe*, 118 Tenn., 601, 102 S. W., 343. The thought underlying cases of the kind just mentioned is the obligation of a common humanity to abstain from consciously doing an unjustifiable injury, and to be observant of the rights of others whom we, by failing to object to a certain course of conduct on their part, have taught to rely upon the continuance of a given *status*. There is no duty to licensees incumbent on a landowner over whose property such persons have been accustomed to go along a path or otherwise to so arrange the property as to safeguard them, even though there should be dangerous holes or pitfalls near the path. *Williams v. Nashville*, 22 Pick. (106 Tenn.), 533, 63 S. W., 231. But if a change should be made in the property by the dig-

Westborne Coal Co. v. Willoughby.

ging of other pits near the path, or across the path, it would be the duty of the landowner, having knowledge of the habits of the licensees in passing over his land, in some way to warn them. He would have a right to change his land in such way as he might deem proper. The negligence would not consist in the act of such change, but in the failure to warn the licensees of the change of *status*.

The principle referred to, however, does not apply to an owner of a business, or of machinery, using it in the accustomed way, even though he use it negligently, unless he have knowledge that such negligence will endanger a licensee, or unless there be such a gross failure to take notice of surroundings as would make the act immediately dangerous to such persons. In other words, the owner of a business house or plant has the right to run it in the accustomed way, and is not responsible to licensees for the method in which he operates that business, unless he knows they are in the way, or owing to their habits are likely to be in the way, or unless although not in the way, they are so near that they may be injured by a negligence so gross as to be equivalent to positive wrong-doing. A good illustration of the principle is found in *Indian Refining Co. v. Mobley*, 134 Ky., 822, 121 S. W., 657, 24 L. R. A. (N. S.), 497. In that case the licensee was injured by the explosion of a steam pipe in plaintiff in error's plant in Georgetown, Kentucky. The explosion was due to the negligent manner in which the steam pipes or fittings were constructed, and directly to the care-

Westborne Coal Co. v. Willoughby.

lessness and lack of forethought on the part of the refining company's employees in the handling of the steam pipe. It was held that notwithstanding such negligence on the part of the employees the company was not liable. To same effect: *White v. Railroad*, supra, *Railroad v. Meacham*, supra. See, also, the following cases: *Batchelor v. Fortescue*, L. R., 11 Q. B. Div., 474, 4 L. T. N. S., 644; *Larmore v. Crown Point Iron Co.*, 101 N. Y., 391, 4 N. E., 752, 54 Am. Rep., 718; *Weitzmann v. A. L. Barber Asphalt Co.*, 190 N. Y., 452, 83 N. E., 477, 123 Am. St. Rep., 560.

The term "active negligence" (to recur for a moment to that specific subject), is one of extensive meaning, obviously embracing many occurrences that would fall short of willful wrongdoing, or of crass negligence; for example, all inadvertent acts causing injury to others, resulting from the failure to exercise ordinary care; likewise all acts the effects of which are misjudged; or unforeseen, through want of proper attention, or reflection. So the term, as a general one, is too broad. It covers acts of willful wrongdoing, also those which are not of that character. Therefore it is not reliable as a measure of right or duty for the purpose of determining liability in cases of the kind before us. Under such a rule, there would be no distinction between the duty owing to licensees and trespassers on the one hand, and invitees or others to whom the exercise of ordinary care is due.

We deem it unnecessary to pursue the subject further.

Let the judgment of the court of civil appeals be affirmed.

Bashor v. Bowman.

D. C. BASHOR v. IDA BOWMAN.

*(Knoxville. September Term, 1915.)***1. EMINENT DOMAIN. Private road. Statutes. Constitutionality.**

Shannon's Code, sec. 1634, provides that: "When the lands of any person shall be surrounded or inclosed by the lands of any other person or persons who refuse to allow . . . such person a private road to pass to or from his . . . lands, it shall be the duty of the county court, on petition of such person . . . to appoint a jury of view, who shall, on oath, view the premises, and lay off and mark a road through the land of such person or persons, . . . and report the same to the next court, which court shall have power to grant an order to said petitioner to open such road, not exceeding fifteen feet wide, and keep the same in repair." Section 1617, provides: "All roads and ferries that have been laid out or appointed, agreeably to law, or that shall be so laid out and appointed, are to be deemed public roads and ferries." *Held*, that section 1634 is not unconstitutional as taking private property for private use without just compensation, since the use declared by section 1617 is a public use. (*Post*, pp. 272-274.)

Acts cited and construed: Acts 1868-69.

Cases cited and approved: *Rice v. Alley*, 33 Tenn., 51; *Henderson v. Lexington*, 22 L. R. A. (N. S.), 104; *Brewer v. Bowman*, 9 Ga., 37; *Robinson v. Swope*, 12 Bush (Ky.), 21; *Roberts v. Williams*, 15 Ark., 43.

Case cited and distinguished: *Clack v. White*, 32 Tenn., 540.

Code cited and construed: Code 1858, sec. 1812; sec. 1617 (S.).

2. EMINENT DOMAIN. Roads. Character of way.

That a highway declared to be public by statute is used chiefly by a private individual does not make it a private highway, where the whole public has the right to use it. (*Post*, pp. 274, 275.)

Bashor v. Bowman.

Acts cited and construed: Acts 1868-69, ch. 14.

Cases cited and approved: Railroad v. Transportation Co., 128 Tenn., 277; State, etc., v. Bishop, 39 N. J. Law, 226; Sherman v. Buick, 32 Cal., 241; Denham v. Bristol County, 108 Mass., 202; In re Hickman, 4 Har. (Del.), 580; McWhirter v. Cockrell, 39 Tenn., 9.

3. EMINENT DOMAIN. Roads. Character. Cost of maintenance.

That a highway declared by statute to be public is opened and maintained at private expense does not detract from its public character, nor does the fact that the statute, authorizing the creation of the road as a highway, refer to it as a public road. (*Post*, pp. 275, 276.)

Cases cited and approved: Sherman v. Buick, 32 Cal., 241; In re Hickman, 4 Har. (Del.), 580; Latch County v. Peterson, 3 Idaho, 398; Denham v. Bristol County, 108 Mass., 202; Shaver v. Starrett, 4 Ohio St., 494; Ferris v. Bramble, 5 Ohio St., 109; Allen v. Stevens, 29 N. J. Law, 509; Wolcott v. Whitcomb, 40 Vt., 40.

FROM WASHINGTON.

Appeal from the Circuit Court of Washington County.—DANA HARMON, Judge.

DIVINE & GUINN, for appellant.

VINES & PRICE, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

This proceeding was instituted in the county court of Washington county to establish a road under section 1634 of Shannon's Code, which section is as follows:

Bashor v. Bowman.

“Private Road; County Court to Appoint Jury of View; Damages to be Paid.—When the lands of any person shall be surrounded or inclosed by the lands of any other person or persons who refuse to allow to such person a private road to pass to or from his said lands, it shall be the duty of the county court, on petition of any person whose land is so surrounded, to appoint a jury of view, who shall, on oath, view the premises, and lay off and mark a road through the land of such person or persons refusing, as aforesaid in such manner as to do the least possible injury to such persons, and report the same to the next court, which court shall have power to grant an order to said petitioner to open such road, not exceeding fifteen feet wide, and keep the same in repair; and if any person shall thereafter shut up or obstruct said road, he shall be liable to all the penalties to which any person is liable by law for obstructing public roads. The damage adjudged by the jury aforesaid shall, in all cases, be paid by the person applying for such order, together with the cost of summoning and impaneling said jury. Gates may be erected on said roads.”

A demurrer was filed to the petition in the county court by which the aforesaid statute was challenged as unconstitutional, on the ground that it authorized the taking of private property for private purposes. This demurrer was sustained by the county court, and on appeal by the circuit court, and the case is before us on appeal from the latter court.

Bashor v. Bowman.

It appears from the petition that no public road touches the lands of petitioner, and that the only way of access to a public road from said land is over the lands of defendant, Ida Bowman. Petitioner said that he had heretofore had an arrangement by which he passed out to the public road over the Bowman lands, but that such right was now denied him by the defendant. He seeks to have a road established under the provisions of the statute quoted.

An act similar to this was passed by the legislature in 1811, and was by this court held unconstitutional in the case of *Clack v. White*, 32 Tenn. (2 Swan), 540, and *Rice v. Alley*, 33 Tenn. (1 Sneed), 51.

In *Clack v. White*, supra, the court said:

“Now, the statute confers upon the county court the power to grant a right of way, against the will of the person who owns the land. It takes from him, *in invitum*, a part of his private estate, and gives it to another, as a private right, for such indemnity as a jury may assess.”

The reasoning of the court in *Clack v. White* was founded on the idea that a road established under that act would become a “private right” of the petitioner. Whatever basis there may have been upon which to rest such a theory at the time of this decision was removed by the Code of 1858, which in terms declared that:

“All roads and ferries that have been laid out or appointed, agreeably to law, or that shall be so laid out and appointed, are to be deemed public roads and fer-

Bashor v. Bowman.

ries.” Code of 1858, sec. 1182 (Shannon’s Code, sec. 1617).

After the two decisions referred to *Clark v. White*, and *Rice v. Alley*, supra, and after the Code of 1858 was enacted, the legislature in 1868-69 re-enacted a statute similar to the act of 1811, which had been held unconstitutional, as aforesaid, and it is this statute which is carried into Shannon’s Code, at section 1634, which we have quoted above. Under the act of 1868-69, the road petitioned for in this case, if laid out and appointed agreeably to law, will become a public road, and not a private right of way.

The act of 1868-69, Shannon’s Code, section 1634, is quite like statutes of other States, and the courts generally hold that public roads may be compulsorily opened over private property to the farms and residences of individuals—

“when necessary to enable such individuals to reach the highways and perform their public duties, and to afford those who desire to visit such individuals, on business or socially, access to their farms and houses.” Note under *Henderson v. Lexington*, 22 L. R. A. (N. S.), 104.

The public is interested in every citizen having a right of way to and from his lands or residence. *Brewer v. Bowman*, 9 Ga., 37.

Such a right of way enables a citizen to discharge the duties he owes to the public, among which are mentioned the duties of attending courts, elections,

Bashor v. Bowman.

churches, and mills. *Robinson v. Swope*, 12 Bush (Ky.), 21.

The constitutionality of a so-called private road law rests upon the obligation of the sovereignty to afford to each member of the community a reasonable means of enjoying the privileges and discharging the duties of a citizen. *Roberts v. Williams*, 15 Ark., 43.

The declaration of section 1182 of the Code of 1858 that all roads laid out and appointed, agreeably to law, shall be deemed public roads fixes the character of the road here in question, secures the rights of the public therein, and meets the objection made in *Clack v. White*, supra, and some cases in other States, to statutes providing for roads of this character. This road, while chiefly for the accommodation of the petitioner, will likewise be open to the use of those who may have occasion to visit petitioner or his premises. The public will have the use of the road, and will derive some benefit from such use. Some of the public may use the road constantly on business or in visiting petitioner. All of the public are entitled so to use it. We have elsewhere stated that:

“An enterprise does not lose the character of a public use because of the fact that its services may be limited by circumstances to a comparatively small part of the public.” *Railroad v. Transportation Company*, 128 Tenn., 277, 285, 160 S. W., 522, 524.

Additional cases upholding the validity of road laws similar to chapter 14, Acts of 1868-69, Shannon's Code, sec. 1634, are: *State, etc., v. Bishop*, 39 N. J. Law,

Bashor v. Bowman.

226; *Sherman v. Buick*, 32 Cal., 241, 91 Am. Dec., 577; *Denham v. Bristol County*, 108 Mass., 202; *In re Hickman*, 4 Har. (Del.), 580.

Other cases in accord, and some to the contrary, will be found collected in the note heretofore referred to, 22 L. R. A. (N. S.), pp. 102-111. We cannot attempt a more extended review of these authorities here. It is sufficient to say that we accept the prevailing view of such statute as the better one and the one more in harmony with modern economic conditions.

There is nothing in *McWhirter v. Cockrell*, 39 Tenn. (2 Head), 9, which conflicts with this result. In *McWhirter v. Cockrell*, it distinctly appeared that the person seeking a road there had other ways of ingress and egress, and in that case the petitioners were merely seeking a more convenient route. That proceeding was not had under the particular statute we are here considering anyhow.

It does not detract from the public character of a road that the expense of opening and maintaining it is sustained by private persons, nor is the reference to these roads in the statute authorizing them as private roads conclusive against their public character. *Sherman v. Buick*, 32 Cal., 241; *In re Hickman*, 4 Har. (Del.), 580; *Latah County v. Peterson*, 3 Idaho (Hasb.), 398, 29 Pac., 1089, 16 L. R. A., 81; *Denham v. Bristol County*, 108 Mass., 202; *Shaver v. Starrett*, 4 Ohio St., 494; *Ferris v. Bramble*, 5 Ohio St., 109; *Allen v. Stevens*, 29 N. J. Law, 509; *Wolcott v. Whitcomb*, 40 Vt., 40.

Bashor v. Bowman.

So we conclude that chapter 14, Acts of 1868-69, Shannon's Code, sec. 1634, does not authorize the taking of private property for private purposes, and that said act does not contravene the provisions of the Constitution and the Bill of Rights relied on in the demurrer.

The judgment below will be reversed, and the cause remanded for further proceedings.

Johnson City v. Weeks.

JOHNSON CITY v. WEEKS *et al.*

(Knoxville. September Term, 1915.)

TAXATION. Exemptions. Municipal corporations. Property.**"Public purpose." Used for public purposes.**

Const., art. 2, sec. 28, provides that "all property . . . shall be taxed, but the legislature may except such as may be held by . . . cities or towns and used exclusively for public or corporation purposes." The Revenue Act exempted from taxation all property of cities or towns "that is used exclusively for public or municipal purposes." Acts 1909, ch. 121, grants to plaintiff city the power to "own and operate a system of waterworks for said city and adjacent territory." Plaintiff city constructed a water pipe line to the national home for volunteer soldiers lying partly within and largely without its limits. The county sought to tax the pipe line, alleging that it was not used exclusively for public purposes. *Held*, that the pipe line was exempt from taxation, since the private use for the home was but incidental to the primary use, which was public in character, since the convenience of surrounding territory might properly be served by the line, and considerations of welfare of the city demanded that a proper water supply for the prevention of epidemics should be afforded the surrounding territory.

Acts cited and construed: Acts 1909, ch. 121.

Cases cited and approved: Omaha Water Co. v. Omaha, 162 Fed., 225; Overholser v. National Home for D. V. S., 68 Ohio St., 236; Ohio v. Thomas, 172 U. S., 276; Lyle v. National Home for D. V. S., 170 Fed., 846; Knoxville v. Park City, 130 Tenn., 626; Smith v. Nashville, 88 Tenn., 464; Newark v. Varona Township, 59 N. J. Law, 94; Henderson v. Young, 119 Ky., 224; Simson v. Parker, 190 N. Y., 19; In re Orillia, 7 Ontario L. R., 389; Slingerland v. Newark, 54 N. J. Law, 62; Spaulding v. Lowell, 23 Pick. (Mass.), 71; Re New York, 99

Johnson City v. Weeks.

N. Y., 569; Kaukauna Water Power Co. v. Green Bay, etc., Co., 142 U. S., 254.

Cases cited and distinguished: Com. v. Covington, 128 Ky., 36; Perth Amboy v. Barker, 74 N. J. Law, 127.

Constitution cited and construed: Art. 2, sec. 28.

FROM WASHINGTON.

Appeal from the Chancery Court of Washington County.—HAL H. HAYNES, Chancellor.

Geo. C. SELLS, for appellant.

J. STANLEY BARLOW, for appellees.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The bill of complaint was filed by the city of Johnson City, a municipal corporation, to enjoin the officials of Washington county from assessing and collecting taxes for county purposes upon a water pipe line, owned by the city, that extends from its corporation boundary line to the south gate of the National Home for Disabled Volunteer Soldiers, an institution occupying a park of several hundred acres partly within and for the most part without the corporate limits.

In the bill it is alleged that the city installed this pipe line for the purpose of disposing of surplus water, not needed or used by the city or its inhabitants, as a supply for the members of the Home adequate to their

Johnson City v. Weeks.

needs; that the Home has about one thousand, five hundred members, a number of whom are citizens of Johnson City; that it is to the interest of the city that such a supply be furnished, as otherwise the water supply of the Home was inadequate and unwholesome, thereby endangering the members and the residents of the city; that the only recourse of the Home for an adequate supply is from the municipal plant; that the rentals collected from that institution are used within the limits of Johnson City for municipal purposes, in extending and improving complainant's water system.

It is alleged that the levy would be void as being on property of complainant that is not subject to taxation, and the bill was filed to have the rights of the complaint city and of the county determined.

A demurrer was filed by the county officials, which was sustained by the chancellor, who conceived that, while the pipe line was properly in use for a corporate proprietary purpose, it was not used for a public purpose within the meaning of our Constitution and revenue act.

The Constitution, art 2, sec. 28, provides:

“All property . . . shall be taxed, but the legislature may except such as may be held by . . . cities or towns, and used exclusively for public or corporation purposes.”

The revenue act undertakes to exempt from taxation all property of cities or towns “that is used exclusively for public or municipal purposes.”

Johnson City v. Weeks.

The city of Johnson City was authorized to lay a pipe line to supply the National Home for Disabled Volunteer Soldiers, lying beyond its corporate limits, under the grant of power contained in Acts 1909, ch. 121, to "own and operate a system of waterworks for said city and adjacent territory." *Omaha Water Co. v. Omaha*, 162 Fed., 225, 89 C. C. A., 205, 15 Ann. Cas., 498, and same case 218 U. S., 180, 30 Sup. Ct., 615, 54 L. Ed., 991.

The last phrase, "adjacent territory," we take to mean its suburbs not within the limits of another municipality.

The National Home for Disabled Volunteer Soldiers is but a charity of the national government administered through the medium of an incorporated entity. *Overholser v. National Home for D. V. S.*, 68 Ohio St., 236, 67 N. E., 487, 62 L. R. A., 936, 96 Am. St. Rep., 658; *Ohio v. Thomas*, 173 U. S., 276, 19 Sup. Ct., 453, 43 L. Ed., 699; *Lyle v. National Home for D. V. S.* (C. C.), 170 Fed., 846.

That institution is in no sense a municipal corporation, but stands in the same plight as does an institution administered as an agency of the State government, such, for example, as the State Normal School located near the same city.

The question to be solved, therefore, is: If a municipality lay a water line from its corporate limits to such an institution, or construct a lighting line for the purpose of supplying water or light (as the case may be) from its plant for such an institution, located in

Johnson City v. Weeks.

territory adjacent to the corporate boundary, is such line subject to taxation (or to be treated as unexempt) in behalf of the county in which such fragment of line lies?

We had thought that the argument of this court in the case of *Knoxville v. Park City*, 130 Tenn., 626, 172 S. W., 286, L. R. A., 1915D, 1103, fairly demonstrated a negative answer; but the counsel of the county of Washington relies upon that case as one announcing a doctrine to the contrary.

In that case the following language was used:

“The court of appeals of Kentucky, in the later case of *Com. v. Covington*, 128 Ky., 36, 107 S. W., 231, 14 L. R. A. (N. S.), 1214, held that the fact that water was furnished for compensation to inhabitants of its suburbs, without its or any corporate limits, does not alter the public purpose or use of its water system so as to make it subject to taxation. But the court took care to distinguish the case it had in hand from the one we have under investigation, saying:

“ ‘We do not mean that a city may enter upon the business of maintaining a waterworks system for other cities or towns, but only that the fact that it incidentally furnishes water to a considerable number of persons in proximity to the city, without injury to the rights of the city, does not alter the public character or use of the property, or make it subject to taxation.’ ”

“The ruling in *Com. v. Covington*, supra, is in harmony with the decision of many courts to the effect that the fact that water is furnished to inhabitants of

Johnson City v. Weeks.

unincorporated suburbs is a mere incident to and not destructive of the public use.”

Later on in the opinion in *Knoxville v. Park City*, the case of *Smith v. Nashville*, 88 Tenn., 464, 12 S. W., 924, 7 L. R. A., 469, was referred to as drawing the same distinction between a furnishing of water to inhabitants of unincorporated suburbs and a furnishing by one city to another and distinct municipality by means of a physical plant owned by the former in the boundaries of the latter.

The argument and the holding in the case of *Knoxville v. Park City* was that the public character of the property there involved was lost because Knoxville could not serve even incidentally its own corporate public purpose by means of a water system owned by it in Park City; that all public municipal powers and purposes exercisable in the borders of the latter city were by legislative act devolved on the municipality of Park City; and that “what is the primary public purpose of Park City may not be an incidental public purpose of Knoxville.”

In *Perth Amboy v. Barker*, 74 N. J. Law, 127, 65 Atl., 201, Mr. Justice Pitney delivering the opinion, it was held that the right of a city to exemption from taxation as to property “when used for public purposes” was not lost by the fact that sales of surplus water were made to parties outside the territorial limits of the city. It was there said:

“The sales of water outside of Perth Amboy are merely incidental to the general public purposes for

Johnson City v. Weeks.

which the waterworks were established and are being maintained and operated by that city. . . . In our view such use of the surplus water does not take away the right of Perth Amboy to exemption from taxation upon the property that is used primarily and principally for the public purposes of that city. See *Newark v. Varona Township*, 59 N. J. Law (30 Vroom), 94 (34 Atl. 1060).''

. See, also, *Henderson v. Young*, 119 Ky., 224, 83 S. W., 583; *Simson v. Parker*, 190 N. Y., 19, 82 N. E., 732; *In re Orillia*, 7 Ontario L. R., 389; 4 McQuillin, Mun. Corp., 3858.

If we resort, as we did in the case of *Knoxville v. Park City*, to the law of eminent domain to aid in ascertaining by analogy the import of the phrase "public purpose," we find the rule there to be that, if a city disposes or purposes to dispose of surplus water for such an outside use, that fact does not deprive it of the right to resort to condemnation nor make the condemnation one for other than a public purpose. *Slingerland v. Newark*, 54 N. J. Law, 62, 23 Atl., 129; *Spaulding v. Lowell*, 23 Pick. (Mass.), 71; *Re New York*, 99 N. Y., 569, 2 N. E., 642; *Kaukauna Water Power Co. v. Green Bay, etc., Co.*, 142 U. S., 254, 12 Sup. Ct., 173, 35 L. Ed., 1004, and note 21 L. R. A. (N. S.), 538, 543.

As will be noted, the ruling is rested upon the principle that such use is but incidental to the primary use, which is public in character.

Johnson City v. Weeks.

The rule is based on consideration of convenience, but convenience that approaches near to necessity. Fringing the boundaries of a city or town, there is nearly always a population that is dependent for advantages of water and light on the initiative and enterprise of the city or town of which it comes so near to being an integral part. Left alone, such a population has not the cohesiveness or the civic strength required to procure such a service for itself. That it should have a supply of water in order, for example, to the prevention of sickness and epidemics, is a matter of concern to the near-by urban population as well as to itself. It is not a far reach that such a service by the city should be covered by a power thus incidentally public in character when that public purpose is not delegated to another municipality.

We are unable to appreciate the force of any reasoning which would concede the existence of such a power in a municipality to serve a considerable number of the homes of individuals in the immediate suburbs of a city through its own pipe lines, which is apparently admitted by the appellee county, and yet deny the existence of the power, with a like consequent immunity, in respect of such a supply when furnished by the municipality to an institution that is a public charity merely because in the same are assembled in barracks and in masses on a government reservation the wards of the federal government. These men, because of advanced age and service in the army and navy, would seem to be peculiarly subject to the ravages of disease, and in

Johnson City v. Weeks.

such need of a supply of water from a city's surplus as to be a matter of solicitude to the inhabitants of the city itself.

The decree of the court below is reversed, and the cause remanded for further proceedings.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION.
JACKSON, APRIL TERM, 1915.

W. B. BATTLE *et al.* v. LOUIS E. CLAIBORNE *et al.*

(*Jackson.* April Term, 1915.)

1. REFORMATION OF INSTRUMENTS. Requisite evidence.

A court of equity will not exercise its powers of reforming a written instrument except upon clear, certain, and satisfactory evidence placing the propriety of reformation beyond reasonable controversy. (*Post*, pp. 291-302.)

Case cited and approved: *Johnson v. Johnson*, 67 Tenn., 261.

Cases cited and distinguished: *Talley v. Courtney*, 48 Tenn., 715; *Perry v. Pearson & Anderson*, 20 Tenn., 431-439.

2. MORTGAGES. Deeds. Evidence. Sufficiency.

Where complainants, claiming through their father, sought the cancellation of a deed from him to C. and of a deed from C. to grantor's wife separately, as a cloud upon their title on the

Battle et al. v. Claiborne.

ground that the first deed was a mortgage which had been shown in the recitals of two subsequent deeds to the land fully paid after the execution of the deed to the wife by C. as executed and delivered by C. to the grantor, evidence held insufficient to support a decree for cancellation. (*Post*, pp. 291-302.)

3. ESTOPPEL. Deeds. Formal sufficiency. Consideration. Recital. When binding.

Where a deed is sufficient in form to pass title to the grantee, and purports to have been made for a valuable consideration, the grantor and his heirs at law are estopped thereby to show that a valuable consideration was not paid by the grantee, where there is no fraud on grantee's part, and the rights of innocent purchasers or creditors of the grantor have not intervened. (*Post*, pp. 302-304.)

Case cited and approved: *Woods v. Bonner*, 89 Tenn., 411.

Cases cited and distinguished: *Henderson v. Overton*, 10 Tenn., 394; *Wilson v. Bass*, 6 Tenn., 110; *Ruffin v. Johnson*, 52 Tenn., 604; *Martin v. Maine Central R. Co.*, 83 Me., 100; *Demorest v. Hopper*, 22 N. J. Law, 599; *Condit v. Bigalow*, 64 N. J. Eq., 504; *King v. Coleman*, 98 Tenn., 564.

4. DEEDS. Formal sufficiency. Recital of consideration. Want of consideration. Title.

Even though such a deed is admittedly without consideration, it passes title to the grantee. (*Post*, pp. 302-304.)

5. HUSBAND AND WIFE. Conveyance to wife. Formal sufficiency. Recital of consideration. Title.

Where one conveyed land in fee to C., who in turn conveyed it to grantor's wife, by a deed containing apt words for the creation of a separate estate, such estate was vested in the wife unincumbered by any rights of the husband, though, as a matter of fact, there was no payment of the valuable consideration recited in each deed. (*Post*, pp. 304-306.)

Cases cited and distinguished: *Barnum v. Le Master*, 110 Tenn., 640; *Ferguson v. Booth*, 128 Tenn., 259.

Battle et al. v. Claiborne.

6. HUSBAND AND WIFE. Deed to wife. Delivery to husband. Recording by husband. Knowledge of wife. Delivery and acceptance.

The execution and delivery by C. to the grantor of the deed to the wife and its delivery by the grantor to the register for record with knowledge that it was afterwards recorded and an assent to and claim under the deed by the wife with knowledge that it had been so made and recorded, was sufficient evidence to warrant the conclusion that there was a delivery to and acceptance by the wife. (*Post*, pp. 306, 307.)

Cases cited and approved: *McEwen v. Bamberger*, 71 Tenn., 576; *McEwen v. Troost*, 33 Tenn., 186; *Nichol v. Davidson County*, 3 Tenn. Ch., 547; *Nailer v. Young*, 75 Tenn., 735; *Mason & Holman v. Holman*, 78 Tenn., 315; *Davis v. Cross*, 82 Tenn., 641; *Davis' Adm'r v. Garrett*, 91 Tenn., 148; *Land Co. v. Hilton*, 121 Tenn., 308; *Scott v. Bank*, 123 Tenn., 275; *Swiney v. Swiney*, 82 Tenn., 316.

7. ESTOPPEL. Failure to assert title. Acts in derogation. Estoppel.

In an action by heirs of a grantor who conveyed land in fee to C., who in turn conveyed it to grantor's wife separately, seeking cancellation of the deeds as a cloud on their title, on the ground that such deed by the grantor to C. was a mortgage which had been subsequently paid, as recited in a deed from C. to the grantor, made subsequent to the conveyance by C. to the wife, the facts that the wife did not claim the land, but spoke of it as the husband's, that she had urged him to will it to her with power of final disposition, and, failing this, induced him to devise her a life estate therein, with remainder over to his kin, did not estop her or those claiming under her from asserting title, where she was justified under the whole transaction and representations made to her in believing that title was in the husband. (*Post*, pp. 307-312.)

Cases cited and approved: *Barnum v. Le Master*, 110 Tenn., 640; *Ferguson v. Booth*, 128 Tenn., 259; *Parkey v. Ramsey*, 111 Tenn., 302.

Battle et al. v. Claiborne.

Case cited and distinguished: *Morris v. Moore & Hancock*, 30 Tenn., 433.

Code cited and construed: Sec. 4246 (S.).

8. HUSBAND AND WIFE. Separate estate. Conveyance to husband.

Under Shannon's Code, sec. 4246, empowering married women to dispose of their separate estates, a married woman can pass title to her husband. (*Post*, pp. 307-312.)

9. WILLS. Provision for wife. Election. Failure. Estoppel.

Where a widow failed within a year to dissent from her husband's will as provided for by Shannon's Code, sec. 4146, the provision of the will for her being a life estate in land owned by her through a conveyance in fee from the husband to C. and a conveyance by C. to her, she having been led by her husband to believe, as did he, that the title was subsequently revested in him by certain deeds of the same property made by C. to him, reciting that the original deed to C. was a mortgage which had been fully paid, the widow's next of kin and heirs at law were not concluded by the failure on the widow's part to so dissent and her acceptance of the provision of the will in derogation of her title, since the statute, being designed to secure to the wife a proper provision from her husband's property by an election made within a time limited in the interests of the speedy administration of estates, does not apply under such facts. (*Post*, pp. 312-321.)

Cases cited and approved: *Reid v. Campbell*, 19 Tenn., 378; *McDaniel v. Douglas*, 25 Tenn., 221; *McClung v. Sneed*, 40 Tenn., 218; *Williams v. Gray*, 41 Tenn., 105; *Waddle, Adm'r v. Terry*, 44 Tenn., 51; *Waterbury v. Netherland*, 53 Tenn., 512; *Demoss v. Demoss*, 47 Tenn., 256; *Parkey v. Ramsey*, 111 Tenn., 302; *Rowlett v. Rowlett*, 116 Tenn., 458; *Smart & Wife v. Waterhouse, et al.*, 18 Tenn., 95; *Owens v. Andrews*, 17 N. M., 597; *Bible v. Marshall*, 103 Tenn., 324.

Case cited and distinguished: *Walker v. Bobbitt*, 114 Tenn., 700.

Code cited and construed: Sec. 4146 (S.).

Battle et al. v. Claiborne.

10. WILLS. Disposition of wife's property by husband's will. Acceptance by wife. Election.

Nor did the acceptance by the widow of the provision of the will in derogation of her title constitute an election by her whereby she and her representatives were estopped to assert title to the land under the doctrine that, where one by will undertakes to dispose of the property of another by giving to the owner thereof other benefits in lieu, the acceptance of the provision is an election by the beneficiary estopping him to assert title, since the will treated the property as belonging to the husband absolutely, and the wife's acceptance of its provision in the belief that title was in the husband could not be an election. (*Post*, pp. 312-321.)

11. ESTOPPEL. Predecessors in title. Warranty. When not binding.

Where a grantor conveyed property to C. in fee, and C. conveyed it to the grantor's wife, the wife's representatives were not estopped to assert the title thus vested in her because of any estoppel which might have arisen against C. by reason of the special warranty in a subsequent deed to the property given by C. to the grantor that "the said C. hereby warrants the title to said land against the lawful claims of all persons claiming by, through, or under him, . . ." or by reason of a recital in such deed that the original deed from grantor to C. was a mortgage which has been fully paid where the special warranty deed was procured by the husband in an effort to becloud the title vested in the wife by the original transaction, which was also had through his procurement. (*Post*, p. 321.)

Cases cited and approved: *Ferguson v. Booth*, 128 Tenn., 259; *Barnum v. Le Master*, 110 Tenn., 640.

12. HUSBAND AND WIFE. Joint possession with wife. Effect.

Where a husband conveyed land in fee to C., and C. conveyed to the grantor's wife, thereby vesting title in her, a claim of title by the husband to the land under subsequent deeds from C. to him could not ripen into title by adverse possession as

Battle et al. v. Claiborne.

against the wife, where the land was timber land, and such possession as was had was jointly with the wife, and not adverse as to either. (*Post*, pp. 321, 322.)

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
—WM. H. FITZ-HUGH, Special Chancellor.

A. H. MURBY and BYARS & CAPELL, for appellants.

JNO. BROWN and GROVER N. McCORMICK, for appellees.

R. M. BARTON, Guardian Ad Litem for infant defendants.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

Col. Frederick Battle and his wife, Martha A. R. Battle, each died testate, the wife surviving the husband. They were childless. For the most part of their married life they resided on what was known as the "old Battle homestead." The house in which they lived was located on land the title to which was in Mrs. Battle at the time of her death, and it had been for many years prior to that event. The land so owned by her when she died was a tract containing two hundred and fifty-five acres. Her holding originally had been larger, but it had been reduced by sales. Lying to the north of, and adjoining the two hundred and fifty-five-acre tract which she owned, was a tract of land containing two hundred and thirty-nine acres. The ownership of this two hundred and thirty-nine-acre

Battle et al. v. Claiborne.

tract is the storm center of this litigation. This land, on the one hand, is claimed by the complainants, who are, for the most part, kindred of Col. Battle. They claim the land as remaindermen under his last will, after the falling in of what they insist was a life estate in Mrs. Battle, created by the will of Col. Battle. On the other hand, this land is claimed by the defendants as the next of kin and heirs at law of Mrs. Battle. These defendants are John A. Claiborne, a surviving brother of Mrs. Battle, and the descendants of a deceased sister of Mrs. Battle. No mention of this tract of land was made by Mrs. Battle in her last will, though she did by that instrument devise the two hundred and fifty-five-acre tract, which it is conceded she owned.

The will of Col. Battle was dated February 15, 1905, and its first item is:

“I give and bequeath to my beloved wife, Martha Battle, during her life all of my land situated in the first district in Shelby county, consisting of two hundred and thirty-nine acres, being an undivided portion of the north end of the tract I live on, and is explained in the deed at her death this land to be sold, or she can sell this land at any time during her life, if she thinks best, and at her death the money is given to the following parties.”

Then follow ten separate bequests of money to as many beneficiaries, who are the complainants in this suit. Then the will continues:

“When this land is sold, and it brings more than the above amounts, it is to be prorated to the above

Battle et al. v. Claiborne.

persons, according to the amounts given them. I give and bequeath to my beloved wife, Martha Battle, all of my personal property. I do nominate and appoint my wife, Martha Battle, to be the executor of this my last will and testament without bond. My executor is to pay all of my just debts before any of these or any bequests are given.

“FRED BATTLE.”

There were two witnesses to the execution of the will, and to it there was added a codicil of date December 11, 1906, making a change in respect of one of the money bequests. This will and codicil was presented for probate by Mrs. Battle on March 27, 1907. She qualified as executrix thereunder and made her final settlement as executrix.

The will of Mrs. Battle was dated November 2, 1912, and was offered for probate June 6, 1912, and duly probated by the executor in it named, who was her nephew, Louis E. Claiborne.

After the death of Col. Battle, Mrs. Battle sold certain standing timber on the land in suit. The timber was cut and removed from the land, and Mrs. Battle never accounted to the complainants for the proceeds. She died leaving an insufficient personal estate to pay her debts. After her death this suit was instituted, its purpose being to secure a decree against her estate for the value of the timber which she had cut and sold. Its further purpose was to have a decree subjecting the two hundred and fifty-five acre tract to sale

Battle et al. v. Claiborne.

in order to satisfy such decree as complainants might recover.

By an amended and supplemental bill complainants sought a decree declaring two certain deeds to be clouds on their title to the tract in suit. One of these deeds was made by Col. Battle to John A. Claiborne, and the other was made by John A. Claiborne to Mrs. Battle. These deeds will be considered more at length hereafter.

In opposition to the purposes of the complainants as above declared, the defendants, by their pleadings, insist: First, that at the death of her husband, and thereafter until her own death, by virtue of the two deeds already mentioned, Mrs. Battle was owner in fee of the land in controversy, from which the timber was cut, and that upon her death the title to the two hundred and thirty-nine-acre tract was cast upon the defendants by descent; second, that under the will of Fred Battle absolute power was vested in Mrs. Battle to sell, not only the timber, but the lands, and therefore, if wrong in their first position, she acquired a fee in the land under her husband's will; third, if wrong in the first and second contentions, then upon a proper construction of the will, complainants could only recover such part of the proceeds of the timber sold as had not been consumed by Mrs. Battle at the time of her death; fourth, that under the prayer of the cross-bill filed by defendants they are entitled to a decree declaring them to be the owners of the two hundred and-

Battle et al. v. Claiborne.

thirty-nine-acre tract in suit, and to a decree dismissing complainant's bills.

The chancellor granted a decree in favor of complainants against the estate for \$1,578, and costs. The cross-bills of defendants were dismissed, and the decree awarded satisfaction and payment of the above amount out of a fund then in court which had been produced by an agreed sale of the two hundred and fifty-five-acre tract owned by Mrs. Battle at the time of her death. The sale of said tract had been consummated during the progress of the cause, by consent of all parties thereto. The decree also awarded relief as to the reformation and cancellation sought by complainants. From this decree, defendants appealed.

It is conceded that Col. Battle was the owner of the land in suit on January 20, 1868, on which date he executed and delivered to John A. Claiborne, Mrs. Battle's brother, a warranty deed purporting to convey the full fee in the land for a recited cash consideration of \$1,200. This deed was acknowledged and filed for registration April 7, 1868. From this date for about nine years, so far as the record shows, the title to this tract of land stood vested in John A. Claiborne.

On December 22, 1870, Claiborne executed a deed purporting to convey said tract of land to his sister, Martha A. R. Battle, for a recited cash consideration of \$1,400. This deed purported to vest in her the full fee as a separate estate in the land in suit. The acknowledgment of this deed is of date August 28, 1872. The deed was not filed for registration until April 5,

Battle et al. v. Claiborne.

1877. For about thirteen years and six months after the date of the registration of this deed the record title to this tract was allowed to stand apparently vested as a separate estate in Martha A. R. Battle, under the deed from Claiborne to her. This period of time, added to the nine years during which the record title had been allowed to rest in Claiborne, makes a total period of about twenty-two years during which the record showed no claim or color of title in Col. Battle to the land in suit. The thirteen-year period above mentioned came to and end on January 10, 1891, when there was filed for registration a quitclaim deed from Claiborne to Fred Battle purporting to convey all of Claiborne's right, title, and interest in the land in suit. This instrument is dated January 27, 1876. There was no acknowledgment until January 6, 1891. It recites, in its first part, that it is made in consideration of five dollars cash in hand paid, but later, in its body, contains this recital:

“I quitclaim all of said land for and in consideration of the \$1,700 paid me in hand.”

This deed makes no reference to the original deed from Battle to Claiborne, nor to the deed from Claiborne to Mrs. Battle. It contains this warranty clause:

“I do hereby warrant the title herein conveyed unto the said Fred Battle, against the lawful claims of all persons whomsoever claiming the same by, through, or under me.”

On the same day the above quitclaim deed was filed for registration, to wit, January 10, 1891, another deed

Battle et al. v. Claiborne.

was filed for registration, in which the grantors were Claiborne and his wife. It was dated January 5, 1891, and acknowledged January 6, 1891. It purports to convey to Fred Battle all of the right, title, and interest of the grantors of every kind in and to the tract in suit, and it contains a warranty by Claiborne only, in these words:

“And the said John A. Claiborne hereby warrants the title to said land against the lawful claims of all persons claiming by, through, or under him, but no further.”

It also contains a recital, the substance of which is that the deed from Fred Battle to Claiborne, dated January 20, 1868, was only a mortgage, and intended to secure an indebtedness “then due” by Fred Battle to Claiborne, and that the same had been paid prior to the execution of the quitclaim deed of date January 27, 1876. It also recites that the failure to file for registration the quitclaim deed last named at an earlier date was due to the loss of that instrument.

Beyond dispute, Col. Fred Battle was the moving spirit in the execution of each of the two deeds and each of the quitclaim deeds above mentioned. Claiborne's part in each and all of the above conveyances was merely passive. The relations between these two men were very close and friendly. Battle was the older man. Claiborne had been partly reared in the Battle home, and had much affection for Battle and his wife, who was Claiborne's sister. Speaking of them, Claiborne testifies:

Battle et al. v. Claiborne.

“They were just as good to me as my own mother and father, and whatever Mr. Battle asked me to do, sign papers and such, I went on and signed them without any question at all. I had that much confidence in him that I never questioned him at all.”

Claiborne testifies that he became twenty-one years of age on December 17, 1865. Col. Battle was his guardian, and, as such, was indebted to him when Claiborne became of age. In December, 1866, Claiborne married, and in the first part of the year 1867 Battle discharged his guardianship debt by conveying to Claiborne a tract of land (not that in suit) containing about one hundred and eighty-five acres. This was a full settlement between them as guardian and ward, and there was no debt due by Battle to Claiborne on January 20, 1868, when Battle conveyed to him the land in suit. Claiborne paid Battle nothing for the land at the time of that deed. He merely accepted the deed at the request of Battle, and he testified, in substance, that he understood Battle's purpose in conveying the land to him was to place it beyond the reach of Battle's creditors. The deed from himself to Mrs. Battle, Claiborne executed at the request of Col. Fred Battle. Mrs. Battle paid Claiborne nothing as the consideration for that deed. When that deed was executed, it passed from the hands of Claiborne into the hands of Col. Battle, and it was he who caused it to be registered. Each of the quitclaim deeds above mentioned was executed by Claiborne at Col. Fred Battle's request. The execution of these quitclaim deeds is strong

Battle et al. v. Claiborne.

corroboration of the truth of Claiborne's statement that he signed whatever papers Col. Battle asked him to sign.

The manifest purpose of each of the quitclaim deeds was to becloud the title of Claiborne's sister to the land in suit. Undoubtedly for her he had great affection, and it is quite improbable that he would have executed these quitclaim deeds had he not been dominated, as he testifies he was, by his confidence in Col. Battle. Claiborne testifies that he never discussed these conveyances with his sister. He is, to be sure, interested in the result of the present controversy, but notwithstanding his evidence appears to us as being truthful. No witness disputes what he says about these transactions. It is not probable that Col. Battle would have communicated his purpose in the execution of the original warranty deed to any other person except Claiborne. There is no assault made on the reputation of Claiborne for truth in this record. The deed from Battle to Claiborne, and from Claiborne to Mrs. Battle, and the undisputed evidence that each of them was executed at the instance of Col. Battle, and that under these deeds, for a period of twenty-two years, Col. Battle caused the public record to show that the legal title to the land was not in him, are weighty corroboration of the evidence of Claiborne to the effect that the original warranty deed was not intended to operate as a mortgage, and clearly refute the recitals of the quitclaim deeds to that effect.: If the recitals of the last quitclaim deed, to the effect that,

Battle et al. v. Claiborne.

the deed by Battle to Claiborne was only a mortgage to secure a debt then due by Battle to Claiborne, and that this debt was paid before the first quitclaim deed was executed, be true, why was the first quitclaim deed withheld from registration? The answer sought to be made to this question by the second quitclaim deed is that the first was not properly acknowledged for registration; also that it was lost. But this answer is not satisfactory. Granting that it was not properly acknowledged, and granting that it was lost, the question arises: What was in the way of securing another quitclaim deed and placing that of record? No answer is made to this question.

The first quitclaim deed was executed in 1876, but not acknowledged and placed of record until 1891. If Col. Battle had desired the record title to the tract in suit to appear to be in him, undoubtedly he would have caused the first quitclaim deed to be acknowledged and filed for registration in 1876, thus giving it priority of registration over the deed from Claiborne to Mrs. Battle, which, though executed in 1870, was not filed for registration until April 5, 1877. Again, if Col. Battle had desired the record title to the tract in suit to appear in him, why was the deed to Mrs. Battle ever filed for registration? It is clear that she did not cause it to be registered; Claiborne was not instrumental in its registration; it is beyond dispute that its registration was caused by Col. Fred Battle, and the only conclusion possible is that it was his purpose that the record title to the tract in suit should

Battle et al. v. Claiborne.

exist in his wife, not in him. The evidence wholly preponderates against complainants' theory that the deed from Battle to Claiborne was intended to be a mortgage.

The jurisdiction of courts of equity to reform written instruments in certain classes of cases is well established. 3 Pom. Eq. Jur., sec. 1376. But this jurisdiction can be successfully invoked only under appropriate pleadings and proper proofs. In one of our cases it is said that the proof must be "clear, certain, and satisfactory." *Johnson v. Johnson*, 67 Tenn. (8 Baxt.), 261. In another case it is said, quoting from Judge Story:

"If the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief, upon the ground that the written paper ought to be treated as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy." *Talley v. Courtney*, 48 Tenn. (1 Heisk.), 715.

In another case it is said:

"The evidence must be clear and strong, proving it to the entire satisfaction of the court." *Perry v. Pearson & Anderson*, 20 Tenn. (1 Humph.), 431-439.

Even if the rule was that the preponderance of the evidence would suffice, the decree of the chancellor granting the relief of cancellation and reformation prayed for by complainants could not stand; for, as we have seen, the preponderance of the evidence is against the theory and averments of the complainants'

Battle et al. v. Claiborne.

pleadings. This conclusion brings us to a consideration of the legal effect of the deed from Fred Battle to Claiborne, and the deed from Claiborne to Mrs. Battle.

Taking up the first of these deeds, it is to be observed that it is sufficient in form to pass title to Claiborne. Next it purports to have been made for a valuable consideration, and in the absence of fraud in the transaction by Claiborne, or the rights of innocent purchasers, or the rights of creditors of Battle, he was, and the devisees under his will or his heirs at law are, estopped by his deed to aver and show to the contrary of its recital, that a valuable consideration was paid by Claiborne for the land. It results that this deed, as between Battle and those claiming under him, the complainants in the present case, passed title into Claiborne. In support of the conclusion just stated, see the following authorities:

“A fact admitted by recital, or directly in a covenant or deed, concludes all the parties to it, and cannot be averred against.” *Henderson v. Overton*, 10 Tenn. (2 Yerg.), 394-397 (24 Am. Dec., 492). “The parties by these deeds have agreed that the distance from the ash to the river is two hundred poles; and shall they not be concluded by it? Whatever is agreed by the parties in pleading or conveyances cannot be contradicted by either of them.” *Wilson v. Bass*, 6 Tenn. (5 Hayw.), 110, 111. “It is a familiar doctrine of the law, founded in sound policy and sound morals, that where one party, by his deliberate act or solemn deed,

Battle et al. v. Claiborne.

has asserted a fact upon which another in privity with him has been induced to act upon the assumption of good faith in said act or deed, the former shall not be heard to gainsay or deny said act or deed." *Ruffin v. Johnson*, 52 Tenn. (5 Heisk.), 604-608. "The name 'estoppel' was given," says Lord Coke, "because a man's own act stoppeth up his mouth to allege or plead the truth." *Martin v. Maine Central R. Co.*, 83 Me., 100, 21 Atl., 740. "An estoppel is where a man is concluded and forbidden by law to speak against his own act or deed; yea, even though it is to say the truth." *Demarest v. Hopper*, 22 N. J. Law (2 Zab.), 599. "Estoppel by warranty is based on the fundamental principles of giving effect to the manifest intention of the grantor, appearing on the deed, as to the lands or estate to be conveyed, and of preventing the grantor's derogating from or destroying his own grant by any subsequent act." *Condit v. Bigalow*, 64 N. J. Eq., 504, 54 Atl., 160.

But suppose complainants were untrammelled by the doctrine of estoppel and free to show and rely on the fact that no consideration passed from Claiborne to Battle; would the fact, if shown, avoid the deed, or defeat the passage of the title into Claiborne? Their pleadings hardly suffice for such a result, but, waiving this, and assuming sufficient pleadings by them, how would they stand? We think they would be in no better case. An excerpt from the opinion in one of our cases is in point here:

Battle et al. v. Claiborne.

“If the assignment made by Finney in 1872 had the effect of a deed, as demurrants insist it did, it passed the title to the land from him to Phillips, whether the assignment was made ‘for value received,’ as recited therein, or ‘without consideration,’ as alleged in the bill; and this is not rendered any the less so by the further allegations that Phillips never asserted any rights under the assignment, and that the possession of the land remained unchanged as between grantor and grantee. The title passes as contemplated by the terms of the deed, whether the conveyance be with or without consideration, and whether it be made in good faith or for a fraudulent purpose; and the title is not revested in the grantor by the mere nonclaim of the grantee and the nonexchange of the possession.” *King v. Coleman*, 98 Tenn. (14 Pick.), 564, 565, 40 S. W., 1082, 1083.

See *Woods v. Bonner*, 89 Tenn. (5 Pick.), 411, 18 S. W., 67.

The next question is whether that part of the chancellor’s decree can stand whereby the deed from Claiborne to Mrs. Battle was canceled, as a cloud on complainants’ title. One view of this matter, which might be entertained under the facts already stated, is that the case falls within the principles announced in *Barnum v. Le Master*, 110 Tenn. (2 Cates), 640, 75 S. W., 1045, 69 L. R. A., 353, and *Ferguson v. Booth*, 128 Tenn. (1 Thomp.), 259, 160 S. W., 67, Ann. Cas., 1915C, 1079. In *Barnum v. Le Master* a deed was made by the husband to the wife reciting a consideration of love

and affection, without any words in the deed indicating a purpose to create a separate estate; yet it was held that a separate estate in the land conveyed by that deed was created in the wife. In *Ferguson v. Booth*, supra, it was held that the *rationale* of *Barnum v. Le Master* was that:

“The mere fact of the conveyance from husband to wife conclusively ascertains the husband’s intention to be that the wife is to hold the property as her separate estate,” and that the reason applied “with equal force where the husband purchases real estate and pays the consideration price and directs that the conveyance to be made to his wife without . . . reservation of his . . . rights as husband,” and it was said “such an act excludes the thought that he intended the purchase for his own benefit.”

In *Ferguson v. Booth*, supra, the deed to the wife was not made by the husband, but he paid the consideration price and caused the deed to be made to her, without words in it indicating that it was intended to create a separate, or other special, estate in her, and without reservation of his rights as husband, and that deed was held to have created a separate estate in the wife.

Now, in the case at bar the husband, Col. Battle, being seised of a fee-simple estate in the land, conveyed it to his wife’s brother, Claiborne, by deed, with covenants of general warranty and reciting a valuable consideration, which, as we have seen, was not, in fact paid. Then Col. Battle caused Claiborne to convey

Battle et al. v. Claiborne.

to the wife by a deed competent in its recitals to a conveyance of the fee and the creation of a separate estate in the wife. Although these two deeds were separated in date of execution by the period of time already set out, it seems reasonable to regard them as one act by the husband, indicating clearly his purpose to have been to create a fee-simple separate estate in the wife, and we might, if necessary, regard these deeds as a surrender by him to her of all the right, title, and interest in the land which he had formerly enjoyed. This view of the matter would be fatal to the chancellor's decree on this branch of the case. But we think there is another more clearly so.

If it be true, as we have held, that the deed from the husband to the brother of the wife extinguished all title in the husband, and vested it in the grantee brother, then the deed of the brother to the wife reciting a valuable consideration and containing apt words for the creation of a separate estate vested that estate in her unincumbered by any rights of the husband. This is perhaps the better view, and it clearly consists with the decision in *King v. Coleman*, supra. But it is said for complainants, in support of the decree canceling the deeds to Mrs. Battle, that she never accepted the deed, and therefore it was inoperative to pass title to her. This point seems to be an afterthought. It is not made in the pleadings of complainants. But, passing this, we are satisfied from this evidence, which is, however, largely circumstantial, that Claiborne, the maker of this deed, delivered it to Col. Battle, and he

delivered, or caused the deed to be delivered, to the register, and directed that it be recorded, and afterwards knew of its recordation and assented thereto. We also think Mrs. Battle, the grantee, assented to and claimed under the deed with knowledge that it had been so made and recorded. Under our cases this is sufficient evidence to warrant the conclusion that there was both delivery and acceptance of this deed, especially in view of the fact that there is no direct or circumstantial evidence tending to show the lack of delivery or acceptance. *McEwen v. Bamberer*, 71 Tenn. (3 Lea), 576; *McEwen v. Troost*, 33 Tenn. (1 Sneed), 186; *Nichol v. Davidson County*, 3 Tenn. Ch., 547; *Nailer v. Young*, 75 Tenn. (7 Lea), 735-737; *Mason & Holman v. Holman*, 78 Tenn. (10 Lea), 315; *Davis v. Cross*, 82 Tenn. (14 Lea), 641, 52 Am. Rep., 177; *Davis' Adm'r v. Garrett*, 91 Tenn. (7 Pick.), 148-150, 18 S. W., 113; *Land Co. v. Hilton*, 121 Tenn. (13 Cates), 308-320, 120 S. W., 162; *Scott v. Bank*, 123 Tenn. (15 Cates), 275, 130 S. W., 757; *Swiney v. Swiney*, 82 Tenn. (14 Lea), 316.

Another insistence for complainants is that, if the legal title to the land in suit was in Mrs. Battle, by virtue of the two deeds, she estopped herself and her heirs at law from setting it up against the devisees under his will. This insistence is predicated: First, on the ground that she did not claim the land, but, on the contrary, spoke of it as his, that she urged him to will it to her, and leave to her the final disposition of it by her will, and, failing in this, that she induced him

Battle et al. v. Claiborne.

to devise her a life estate in the land, with remainder over to his kin, in substance as his will was finally made; second, that after his will had been made in substantial accord with her wishes, she accepted the provisions made for her thereunder, qualified as executrix, and by so doing elected to take under the will, rather than to dissent from it, and to stand upon her legal rights, and thereby that she and her heirs at law are estopped by her election from claiming title under the deed to her.

As already indicated, we are satisfied from circumstances disclosed by the record that Mrs. Battle had knowledge of the existence of the two deeds, and believed that by them she held the legal title to the land. We think she must have had this knowledge prior to the registration of the quitclaim deeds from Claiborne to her husband in the year 1891; and further, we are of the opinion that she not only knew of her title, but had refused to convey the land to her husband on or prior to the date last named. At that date Col. and Mrs. Battle were well advanced in life. It is clearly to be gathered from this record that dissensions had sprung up between them prior to the recordation of these quitclaim deeds over the question of devolution of the title to the land in suit upon the death of the survivor of them. The bone of contention was whether his or her kin should have the property when each of them had passed away. We think it clear that such dissensions not only existed, but that it had reached a point where it threatened to result in a separation of

Battle et al. v. Claiborne.

these old people. This is a pathetic, but clearly established, fact of the record. Just when these dissensions began is not clearly shown, but that they existed is beyond controversy. The fact that they existed adds strength to a conviction that they were well developed, and even robust, prior to the registration of the two quitclaim deeds. In our opinion, those two deeds would never have been recorded if this wife had not refused to convey the land to her husband. There was then vested in her a separate estate in the land. Under our statutes she was competent to convey the title to her husband. Shan. Code, sec. 4246; *Barnum v. Le Master*, 110 Tenn. (2 Cates), 640, 75 S. W., 1045, 69 L. R. A., 353; *Ferguson v. Booth*, 128 Tenn. (2 Thomp.), 259, 160 S. W., 67, Ann. Cas., 1915C, 1079. There was no necessity of the recordation of the two quitclaim deeds if the wife was willing to convey to the husband. The second of the two quitclaim deeds was drawn by an eminent member of the Memphis bar, acting as the attorney of the husband. We are unable to perceive that intelligent counsel would have advised the husband to record these two quitclaim deeds if it had been possible to accomplish a revestiture of the title to the land in suit by the simple process of a deed from the wife to the husband. It was not necessary to record the quitclaim deeds in order to get any title out of Claiborne. As a source of title Claiborne was dry when he executed and delivered the warranty deed to his sister, Mrs. Battle. No title remained in Claiborne after that event and this fact must have been perfectly

Battle et al. v. Claiborne.

clear to Col. Battle's legal adviser. It must have been equally clear to this legal adviser that Mrs. Battle was competent to convey her separate estate in the land to her husband.

But, while these matters were all clear to the counsel advising Col. Battle in this transaction, it does not follow by any means that they were clear to Mrs. Battle. She was unlearned in the law; and, while it is manifest that the execution of the quitclaim deeds did not destroy, but only beclouded, her title to the land, beyond all question she was made to believe that the effect of these quitclaim deeds was to take the title out of her. This fact is established by positive evidence coming from a witness produced by complainants, and we think all Mrs. Battle ever said or did in derogation of her own title was caused by the erroneous impression so made upon her mind. This impression was never corrected during her life. She labored under it to the end of her days. When she failed to dissent from the will, when she qualified as executrix thereof and acted as such, and accepted the provision made for her therein, she was wholly ignorant of the fact that the fee-simple title to the land in suit had been vested in her more than thirty years prior to the probate of her husband's will.

After Col. Battle's death, and in respect of the matter of the probating of his will, Mrs. Battle secured counsel, Mr. Murray of Memphis, but she was not advised by him of the true state of her title. He is now of counsel for the complainants in this suit, and testi-

fied as a witness on their behalf. It is not shown that Mrs. Battle ever knew that she had a right to dissent from the will of her husband. Even if she had such knowledge, but did not know or suspect herself to be the owner of the land in suit, there would have been in her mind no good reason for dissenting from the will. On the other hand, had she know that she possessed the true title to the tract of land in suit, good reason would have existed for a dissent, because its value largely exceeded the bequest in her favor of his personal property. The belief she had in the validity of his title to the land was the result of his action in asserting title under the quitclaim deeds, his employment of learned counsel, and, we have no doubt, the employment of means to convince her which are not fully disclosed by the evidence in this cause. Just what was done to produce in her mind the conviction that the quitclaim deeds had divested her of title and vested title in him does not appear, but the result of what must have been done very clearly appears. It is clear that she believed he possessed the true title to the land in suit when she failed to dissent from the will and accepted benefits under it. Whatever was done manifestly was intended to operate to her disadvantage, to induce her to surrender her clear title to the property, and to act in derogation thereof, and all this was done after failure to secure from her a voluntary relinquishment and conveyance of the true title which she held to the land.

Battle et al. v. Claiborne.

Under these facts it is clear that no estoppel *in pais* (leaving out of view for the present the question of election) arises against her representatives in favor of these complainants. In one of our cases it is said:

“To justify . . . this principle of estoppel, it is material that the party should be fully apprised of his rights, and should, by his conduct or gross negligence, encourage or influence the purchase; ‘for, if he is wholly ignorant of his rights, . . . or if the purchaser knew them, or if his acts, or silence, or negligence do not mislead, or in any manner affect the transaction, there can be no just inference of actual or constructive fraud on his part.’ ” *Morris v. Moore & Hancock*, 30 Tenn. (11 Humph.), 433.

See, also, *Parkey v. Ramsey*, 111 Tenn. (3 Cates), 302-307, 76 S. W., 812, and cases there cited.

The next question is: Must the heirs at law of Mrs. Battle be held concluded by her failure to dissent from her husband's will, by her qualification as executrix and acceptance of benefits thereunder? The solution of this question necessitates a consideration of our statutes upon the subject, some of our decisions, and the doctrine of election as the same has been held to apply to our legislation. Section 4146, Shan. Code, provides:

“A widow may dissent from her husband's will: (1) Where a satisfactory provision in real or personal estate is not made for her; in which case she shall signify her dissent in open court within one year after the probate of the will. (1784, ch. 22, sec. 8; 1851-52, ch.

79, sec. 1.) (2) Where a provision in personal estate is made for her, but the whole of the husband's property, including the bequest, is taken for the payment of his debts; in which case, without any formal dissent, she may sue for her dower (1845-46, ch. 214), and in both cases she shall be endowed as if her husband had died intestate."

The following of our cases involve applications of the widow for dower in the lands of which her husband died seised where she had failed to dissent from his will within the time allowed by the statute, in each of which the claim of the widow to be endowed was rejected on the ground that her failure to dissent within the time allowed by law operated as an election on her part to claim under the will alone: *Reid v. Campbell*, 19 Tenn. (Meigs), 378-385; *McDaniel v. Douglas*, 25 Tenn., (6 Humph.), 221; *McClung v. Sneed*, 40 Tenn. (3 Head), 218-224; *Williams v. Gray*, 41 Tenn. (1 Cold.), 105; *Waddle, Admr, v. Terry*, 44 Tenn. (4 Cold.), 51, 55; *Waterbury v. Netherland*, 53 Tenn. (6 Heisk.), 512. In some of these cases, in addition to claiming an allotment of dower in the lands of her husband, the widow also sought a distributive share of his personal estate. This relief was also denied on the ground above stated.

The policy of the legislation, construed by the foregoing decisions, as it appears to us, is twofold: First, in a case where a satisfactory provision in real or personal estate is not made for the widow by the will of her husband out of his estate to enable her to dissent

Battle et al. v. Claiborne.

from his will and take such part of his estate as she would be entitled to had he died intestate. The second policy underlying the statute, as we see it, is to fix a definite period of time after the probate of the husband's will within which the widow shall be compelled to elect either to accept and be held to be satisfied by the provision made for her in the will, or to dissent from the will. This second policy of the statute was designed to accomplish a speedy closing up or administration of the affairs of the estate of the testator, and a definite adjustment of the rights of those interested in the estate; that is, the rights of the widow, on the one hand and the legatees, on the other, or in cases of partial intestacy of the widow, on the one hand, and the legatees and distributees, on the other. To effectuate the above purposes of the statute, the duty of election which it imposes on the widow has been enforced without variation except in the case of *Demoss v. Demoss*, 47 Tenn. (7 Cold.), 256, but that case was overruled by *Walker v. Bobbitt*, 114 Tenn. (6 Cates), 700-710, 88 S. W., 327. In the case at bar the heirs at law of the widow are not seeking to enforce her rights as a distributee in the estate of her husband, nor does the case involve an application by the widow to have dower set apart out of her husband's land. On the contrary, in this case the heirs at law of the widow are seeking to be let into her estate in a tract of land which we have heretofore held was her property at the time her husband's will was made. If it was her property at that date, her heirs at law are entitled to be let into the en-

Battle et al. v. Claiborne.

joyment of it, unless her conduct during life precludes them as an estoppel. Did her conduct amount to an estoppel under the doctrine of election? We have three cases which shed light upon this question: *Parkey v. Ramsey*, 111 Tenn. (3 Cates), 302, 76 S. W., 812; *Walker v. Bobbitt*, 114 Tenn. (6 Cates), 700, 88 S. W., 327; *Rowlett v. Rowlett*, 116 Tenn. (8 Cates), 458, 95 S. W., 821. None of these cases may be said to determine this controversy, but the principles announced in each of them enter largely into the determination of the present case.

It is laid down in Mr. Pomeroy's work on Equity Jurisprudence (volume 1, sec. 472) as a fundamental rule that:

“In order to create the necessity for an election, there must appear on the face of the will itself, or of the other instrument of donation, a clear, unmistakable intention on the part of the testator or other donor to dispose of property which is in fact not his own. This intention to dispose of property which, in fact, belongs to another, and is not within the donor's power of disposition, must appear from the language of the instrument as unequivocal, which leaves no doubt as to the donor's design; the necessity of an election can never exist from an uncertain or dubious interpretation of the clause of donation. It is the settled rule that no case for an election arises unless the gift to one beneficiary is irreconcilable with an estate, interest, or right which another donee is called upon to relinquish; if both gifts can, upon any interpretation of

which the language is reasonably susceptible, stand together, then an election is unnecessary.”

And in section 473 on the same subject he says:

“If the language of the donation is ambiguous, so that its correct interpretation is at all doubtful, it is now a firmly established rule that parol evidence of matters outside the instrument cannot be admitted for the purpose of showing an intent of the donor to dispose of property which he knew did not belong to him, and thus create the necessity for an election. The intent of the donor to dispose of that which is not his, ought to appear upon the instrument. There were early decisions which acted upon another view, and received such evidence as controlling, but they have been completely overruled by subsequent authorities. Of course, extrinsic evidence is always admissible in such cases, as well as in all others arising from wills and deeds in order to show the surrounding circumstances, the nature, situation of the property, the relations of the donor to the beneficiaries, and the like facts, which place the court in the shoes of the donor; but such evidence can go no further.”

Now, let us apply the above principles to the language of Col. Battle's will herein before set out. He says: “I give and bequeath to (naming his wife) all of my land,” etc. Manifestly, Col. Battle, as well as his wife, was convinced, when he made his will, that the land in suit was his land. He knew it had been his land prior to the date of his deed to Claiborne. He knew Claiborne had paid him nothing for the land.

He knew his wife had paid Claiborne nothing for the land, and evidently he believed the fact to be that the two quitclaim deeds from Claiborne to himself had revested in him the legal title to the land. He was not learned in the law, and doubtless looked upon the land in good morals as his property, and, though he must have known that the recital of the last quitclaim deed to the effect that his deed to Claiborne was a mortgage was untrue, yet we think it is clear that he considered that recital sufficient in law to revest the title to the land in him; and so, in his will, he called it "my land." It thus appears on the face of his will that it was not his purpose or intent to give his wife a life estate in her own land, but to give her a life estate in his land. It fails to appear on the face of his will that he intended to give some of his property to her, and her land to another person. On the contrary, it appears from the face of his will that his purpose was to give her a life estate in his land, the same to be sold at her death, and the proceeds divided among the devisees named in his will. Mr. Pomeroy, by way of illustration, in section 464, vol. 1, gives the early case, decided by Lord Chancellor Cowper, to be one where the duty of election arose:

"A. was seized of two acres, one in fee, t'other in tail; and having two sons he, by his will, devised the fee simple acre to his eldest son, who was issue in tail; and he devised the tail acre to his youngest son, and dy'd; the eldest son entered upon the tail acre; whereupon the youngest son brought his bill in this court

Battle et al. v. Claiborne.

against his brother, that he might enjoy the tail acre devised to him, or else have an equivalent out of the fee acre, because his father plainly designed him something.”

The duty of election was held to arise in that case because the devise of the fee acre to the eldest son was of property owned by the testator made with the tacit condition that the eldest son should suffer the younger son to quietly enjoy the tail acre devised to him, over which, however, the testator knew he did not possess the power of disposition.

It clearly does not appear that Col. Battle knew he did not possess the power of disposition over the land in controversy. He was convinced that he had the power of disposition over it. He called it “my land,” disposed of it as his own property, and was manifestly only undertaking by the execution of his will to pass over to the objects of his bounty the title which had originally been vested in him, which he considered still to exist in him by operation of the second quitclaim deed.

To hold, on the face of this will, and in the light of all the facts of this record, that Col. Battle intended the bequest of the personalty to his wife by his will to be upon condition that she surrender her title to the land in suit would be to convict him of a fraudulent purpose in the execution of his will, considering that act in connection with what has heretofore been said of the means by which he accomplished a conviction in the mind of his wife that she had no title to the land, in which event

Battle et al. v. Claiborne.

the solution of this case would depend upon the principles applied in *Smart and Wife v. Waterhouse et al.*, 18 Tenn. (10 Yerg.), 95.

It is unnecessary to adopt so harsh a view of his purposes. The more charitable view, and the one more consistent with honesty of purpose and fair dealing on the part of each of these old people, is that each of them, at the time of the registration of the quitclaim deeds, believed themselves to be the owners of the land; Col. Battle because he had never received anything of value in consideration of his deed to Claiborne. She, on the other hand, believed herself to be the owner, basing this claim on the deed to her and on the ground that he had used certain of her money received from sales of other land. But, conceding an honest purpose on his part, through all these dealings, down to and including the execution of his will, we place the determination of the case upon other ground than that of fraudulent conduct or intention on his part. In *Walker v. Bobbitt*, supra, this court, speaking of the doctrine of election, said:

“This doctrine properly arises where a testator manifests a clear intention to dispose of property not his own, and by other parts of his will, from his own estate, confers benefits upon the owner of that property.”

The entire doctrine of election is based either upon a condition expressed in the deed or will of the donor or a condition which the law implies on account of what appears upon the face of the instrument. Certainly there is no express condition appearing on the face

Battle et al. v. Claiborne.

of Col. Battle's will, and, in view of his claim of ownership in his own right of the land in suit, no tacit condition can be held to arise by implication of law. Such a construction of his will is rebutted by the claim of ownership in himself so clearly shown on the face of the will and supported by the undisputed facts and circumstances of the record.

Back of the express or implied condition in the deed or will above referred to Mr. Pomeroy bases the doctrine of election on the maxim that he who seeks equity must do equity. Volume 1, sec. 465. If so, did equity demand an election on the part of Mrs. Battle, laboring, as she did, until her death, under a delusion produced by the acts of her husband? For general authority on this point see *Owens v. Andrews*, 17 N. M., 597, 131 Pac., 1004, 49 L. R. A. (N. S.), 1072, and note. But it is insisted that the rule of election established by the statute applies. This rule is by no means of universal application. It was not enforced against the rights of the wife acquired by an antenuptial contract with her husband in *Williams v. Gray*, 41 Tenn. (1 Cold.), 105; nor against the rights of the wife in land the title to which the husband held as her trustee by construction of law in *Bible v. Marshall*, 103 Tenn. (19 Pick.), 324, 52 S. W., 1077; nor where the husband and wife owned the land as tenants by entireties, in *Parkey v. Ramscy*, 111 Tenn. (3 Cates), 302, 76 S. W., 812, and *Walker v. Bobbitt*, 114 Tenn. (6 Cates), 700, 701, 88 S. W., 327; nor against the right of the widow to the exempt property of her husband's estate, under sec-

Battle et al. v. Claiborne.

tion 4023, Shan. Code, in *Rowlett v. Rowlett*, 116 Tenn. (8 Cates), 458, 95 S. W., 821; nor do we think the rule of the statute applies under the peculiar facts of the present case.

The next insistence for complainants is that John A. Claiborne, who conveyed the land in dispute to Mrs. Battle, is estopped by the special warranty contained in his deed to Fred Battle, dated January 5, 1891. The language of this special warranty has been copied *supra*.

There is no merit in this insistence. This special warranty deed was procured from Claiborne by Col. Battle in an effort to becloud the title of Mrs. Battle. Col. Battle was estopped to accept and predicate rights upon either the original quitclaim deed or the special warranty deed. *Ferguson v. Booth*, 128 Tenn. (1 Thomp.), 259, 160 S. W., 67, Ann. Cas., 1915C, 1079; *Barnum v. Le Master*, 110 Tenn. (2 Cates), 640, 75 S. W., 1045, 69 L. R. A., 353. Neither can those in privity of title with Col. Battle claim any rights either under the quitclaim deed or the special warranty deed. A court of equity will decline to hear them set up any rights under those deeds.

Nor do we think there is any merit in complainants' insistence that Col. Battle acquired title to the land in suit by adverse possession. The land in suit was timbered land, and such possession as was had of it was the joint possession of the husband and wife, and not adverse as against either of them.

Battle et al. v. Claiborne.

It results that the decree of the chancellor must be reversed, and complainants' bill dismissed, and a decree will go in this court in favor of defendants under the cross-bill. The case will be remanded to the chancery court for such further proceedings as may be necessary and on the remand a copy of this opinion will accompany the *procedendo*.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1915.

MARION P. BURNETT *v.* R. R. LAYMAN.*

(*Knoxville*. September Term, 1915.)

1. CERTIORARI. Review. "Final judgment."

Acts 1907, ch. 82, provides that *certiorari* shall not be issued by the supreme court to the court of civil appeals after a lapse of ninety days from the final judgment or decree of that court. During the 1914 term of the court of civil appeals, after affirmance of a judgment for defendant plaintiff died, and a suggestion of death being made, it was attempted to revive the suit in the name of plaintiff's widow. A petition for *certiorari* prosecuted in the name of the widow and next of kin was denied by the supreme court and at the 1915 term of the court of civil appeals, an administrator having qualified, the suit was revived in the name of the administrator, who brought *certiorari*. Shannon's Code, sec. 4570, declares that the intervention of a term between the death of a party and the qualification of a personal repre-

*On degree of care and skill required of physician see note in 37 L. R. A., 830; on that required of a specialist see note in 20 L. R. A. (N. S.), 1030.

Burnett v. Layman.

sentative shall not work an abatement or discontinuance of the suit, nor shall the suit abate or discontinue for the death of either party until the second term after the death has been suggested and entry to that effect made of record. *Held*, that the suggestion of death prevented the judgment of the court of civil appeals from becoming "final," though the attempted revival was a nullity, and hence the final judgment of the court of civil appeals was the order of revivor in the administrator's name, so petition for *certiorari* could be taken within ninety days therefrom. (*Post*, pp. 327, 328.)

Acts cited and construed: Acts 1907, ch. 82, sec. 8.

Case cited and distinguished: *Burnett v. Layman*, 130 Tenn., 423.

Code cited and construed: Secs. 4025-4029; 4570; 4579.

2. PHYSICIANS AND SURGEONS. Care.

While a physician does not guarantee the cure of his patients, and is not liable for an error in diagnosis, yet in performing an operation he is employing surgery as an art, and is liable for negligence. (*Post*, pp. 328, 329.)

Cases cited and approved: *Alder, Admr. v. Buckley*, 31 Tenn., 69; *Wood v. Clapp*, 36 Tenn., 65; *Staloch v. Holm*, 100 Minn., 276; *Gillette v. Tucker*, 67 Ohio St., 106; *Whitesell v. Hill*, 37 L. R. A., 834.

3. PHYSICIANS AND SURGEONS. Actions for malpractice. Evidence. Sufficiency.

In an action for injuries received when defendant sounded the urethra, evidence *held* to warrant a finding of negligence. (*Post*, p. 329.)

4. PHYSICIANS AND SURGEONS. Malpractice. Negligence.

A physician after he had seriously injured his patient in sounding the urethra, causing keen suffering and bleeding, is not warranted in leaving his patient without giving immediate relief, for a doctor who undertakes the treatment of a case may not abandon his patient until the facts justify cessation of attention or he gives the patient due notice that he intends to quit the

Burnett v. Layman.

case and an opportunity to procure other medical attention.
(*Post*, pp. 329, 330.)

Cases cited and approved: Dale v. Donaldson L. Co., 48 Ark., 188; Barbour v. Martin, 62 Me., 536; Ballou v. Prescott, 64 Me., 305; Williams v. Gilman, 71 Me., 21; Dashiell v. Griffith, 84 Md., 363; Becker v. Janinski, 15 N. Y. Supp., 675; Lathrope v. Flood (Cal.), 63 Pac., 1007.

FROM KNOX.

Appeal from the Circuit Court of Knox County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
VON A. HUFFAKER, Judge.

W. F. BLACK, for appellant.

FRANK SANDERS, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

This suit was brought to recover damages for alleged malpractice from the defendant, a physician, at Knoxville.

The circuit court directed a verdict in favor of defendant, and the judgment entered was affirmed in the court of civil appeals at its Knoxville term, 1914. During the same term of the court of civil appeals the plaintiff died, and an effort was made to revive the suit in that court in the name of Manda Burnett, "his

Burnett v. Layman.

widow and next of kin," under section 4025-4029, Shannon's Code, and a petition for *certiorari* was prosecuted to this court in the name of said Manda Burnett, his widow and next of kin.

We dismissed this petition (130 Tenn., 423, 171 S. W., 76), holding that the sections of the Code just referred to governing an action in case of death by wrongful act had no application to the present case, but that this case fell within the terms of Shannon's Code, section 4579, which provides that:

"Suit abated by the death of either party, may be revived by or against the heir, personal representative, guardian, or assign, as the case may be, who may be legally entitled to the decedent's place in the subject-matter of litigation."

The court said:

"The personal representative is in the present case the successor in interest of the deceased plaintiff, or, in other words, the one 'legally entitled to the decedent's place in the subject-matter of the litigation,' and the suit should therefore have been revived in his name." *Burnett v. Layman*, 130 Tenn., 423, 425, 171 S. W., 76.

At the 1915 Knoxville term of the court of civil appeals, an administrator having meanwhile qualified, the suit was revived in the name of said administrator in that court, and a petition for *certiorari* to this court has been filed by the said administrator at our present term.

Burnett v. Layman.

The first question that arises is whether this petition for *certiorari* can be sustained under section 8, ch. 82, Acts of 1907, providing that *certiorari* shall not be issued by this court to the court of civil appeals after a lapse of ninety days from the final judgment or decree of that court. In view of this statutory provision, can this court now review a judgment of the court of civil appeals entered at its 1914 term at Knoxville? Under the circumstances of this case, we think we have such power.

Section 4570 of Shannon's Code is as follows:

“The intervention of a term between the death of a party and the qualification of a personal representative shall not work an abatement or discontinuance of the suit; nor shall the suit abate or discontinue for the death of either party, until the second term after the death has been suggested and proved or admitted, and entry to that effect made of record.”

A suggestion of the death of plaintiff was made and entered of record in the court of civil appeals when the attempt was made to revive in the name of the widow. The attempted revivor in this manner was beyond the court's jurisdiction and a mere nullity, but the suggestion of death was made and admitted and entered of record.

Plaintiff's death deprived the judgment of the court of civil appeals of its final character. No execution could have issued thereupon until revivor; nor could the suit have been abated or discontinued for two terms under the express provisions of Shannon's Code, sec-

Burnett v. Layman.

tion 4570, above quoted. Something else remained to be done in the court of civil appeals.

Therefore the final judgment in the court of civil appeals herein was the order of revivor in the administrator's name duly made by that court under section 4570, Shannon's Code, at its 1915 term, and this petition for *certiorari* comes within ninety days from that order and was properly allowed.

Burnett was being treated for a bladder trouble, and it was thought necessary by the defendant to sound the urethra. In the performance of this operation there is some evidence tending to show that the lining of the bladder was "pocketed" or perforated by the sound.

A physician does not guarantee the cure of his patients. Presuming a careful diagnosis, a physician is not liable for damages resulting from an honest mistake in determining upon the character of treatment to be administered or in determining upon the necessity of an operation. These things are mere matters of judgment upon which an action cannot ordinarily be predicated.

While it is sometimes difficult to distinguish between negligence and an error of judgment, it may be said, generally speaking, that in performing an operation the doctor is employing surgery as an art, and he is liable for negligence in operating. The foregoing statement is supported by the following authorities: *Alder, Adm'r, v. Buckley*, 1 Swan. 69; *Wood v. Clapp*, 4 Sneed, 65; *Staloch v. Holm*, 100 Minn., 276, 111 N. W., 264, 9 L. R. A. (N. S.), 712; *Gillette v. Tucker*, 67 Ohio

Burnett v. Layman.

St., 106, 65 N. E., 865, 93 Am. St. Rep., 639; *Whitesell v. Hill*, 37 L. R. A., 834, note 5.

So in this case, while the defendant cannot be held liable for an error of judgment in determining upon the sounding operation, he is liable for any negligence in the actual performance thereof. Some of the evidence introduced for plaintiff indicates that the defendant below did not exercise the care which an ordinarily prudent physician should have employed in his manner of using the sound. In fact, in the absence of any explanation whatever from defendant it might have been inferred by the jury that the lining of the bladder would not have been perforated if due care had been used.

Another count of the declaration seeks to hold the defendant liable on account of his abandoning the case, and we think there is evidence to sustain this count.

It appears that when this sound was introduced the plaintiff heard something pop, and the withdrawal of the sound was followed by a flow of blood and pus. The defendant appeared excited, announced that he was no surgeon, and told plaintiff he must procure a surgeon. Defendant then hurriedly left, without any effort to relieve plaintiff or administer to him further. Plaintiff did not procure another doctor until the next day or day thereafter.

It is well settled that a physician who undertakes the treatment of a case may not abandon his patient until in his judgment the facts justify the cessation of attention, unless he give to the patient due notice that he

Burnett v. Layman.

intends to quit the case and affords the patient opportunity to procure other medical attendance. *Dale v. Donaldson L., Co.*, 48 Ark., 188, 2 S. W., 703, 3 Am. St. Rep., 224; *Barbour v. Martin*, 62 Me., 536; *Ballou v. Prescott*, 64 Me., 305; *Williams v. Gilman*, 71 Me., 21; *Dashiell v. Griffith*, 84 Md., 363, 35 Atl., 1094; *Becker v. Janinski*, 15 N. Y. Supp., 675; *Lathrope v. Flood* (Cal.), 63 Pac., 1007.

What is fair notice to a patient depends upon the circumstances of each case. In *Lathrope v. Flood*, supra, the doctor left his patient, a woman during parturition, on account of her screams, and she was unable to procure another doctor for an hour. The court held him guilty of negligence and unprofessional conduct and sustained a judgment in favor of the woman against him.

In the case before us the plaintiff below appears to have been suffering greatly, bleeding, and in need of immediate attention when the defendant abandoned him. Certainly the defendant should have done something in this pressing case to have relieved the distress of his patient. We think the defendant is liable for his conduct. He should have remained with the plaintiff until immediate sufferings were relieved, or until another doctor had been secured.

The case will be reversed and remanded for a new trial.

State Life Ins. Co. v. Dunbar.

VOLUNTEER STATE LIFE INS. CO. v. WM. F. DUNBAR,
STATE INSURANCE COMMISSIONER.*(Knoxville. September Term, 1915.)*

1. **INSURANCE. Life companies. Right to erect building.** Shannon's Code, sec. 2272, authorizes life companies to purchase and hold any real estate necessary for the transaction of the corporate business. Acts 1907, ch. 458, entitled an act to regulate the investment of the funds of domestic life companies, provides in section 3 that such companies may acquire land such as shall be requisite for convenient accommodation in the transaction of business, but that all other lands shall be disposed of. *Held*, that the directors of such companies should be given considerable latitude in determining the character of the building which shall be erected for a corporate home, and they may erect a large office building worth more than the combined capital stock and surplus of the company, not all of which is then necessary for the needs of the company for that will tend, where the land is very valuable, to reduce their rents. (*Post*, pp. 334-341.)

Acts cited and construed: Acts 1907, ch. 458; Acts 1881, ch. 126.

Cases cited and approved: *Fourth Nat. Bank v. Stahlman*, 132 Tenn., 367; *Brown v. Schlier*, 118 Fed., 981; *People v. Pullman Palace Car Co.*, 175 Ill., 125; *Rector v. Hartford Deposit Co.*, 190 Ill., 380; *Simpson v. Westminster Palace Hotel Co.*, 8 Ho. Lords Cas., 712; *Farmers', etc., Bank v. Western, etc., Co.*, 215 Pa., 115; *Barrow v. Nashville, etc., Turnpike Co.*, 28 Tenn., 304; *Searight v. Payne*, 1 Tenn. Ch., 186; *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S., 405.

Code cited and construed: Sec. 2272 (S.).

State Life Ins. Co. v. Dunbar.

2. INSURANCE. Life companies. Power of insurance commissioner.

While Shannon's Code, sec. 5165 *et seq.*, authorizes state officials to call in question before the courts any excess of corporate action, and Acts 1907, ch. 458, sec. 3, subsec. 4, declares that life companies shall dispose of land not necessary for the accommodation of their business within two years and shall not hold property for a longer period without a certificate from the insurance commissioner extending time for the sale of such property, the consent of the insurance commissioner to the acquisition of land and the erection of a building for the home office is not necessary. (*Post*, pp. 341, 342.)

Cases cited and approved: State ex rel. v. Turnpike Co., 3 Tenn. Ch., 163; State ex rel. v. Turnpike Co., 112 Tenn., 617; Insurance Co. v. Craig, 106 Tenn., 624.

Code cited and construed: Sec. 5165 (S.).

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.—W. B. GABVIN, Chancellor.

FRANK M. THOMPSON, Attorney-General, for appellant.

BURKETT MILLER and W. B. MILLER, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The Volunteer State Life Insurance Company is a body corporate under the laws of this State, with *situs* at Chattanooga. Its officials, with the unanimous con-

State Life Ins. Co. v. Dunbar.

currence of the stockholders and directors, formulated a plan for the purchase of a lot at the corner of two of the leading streets of that city, and for the erection thereon of a home office building. Out of abundance of caution the company consulted the appellant, the insurance commissioner of this State, with a view to obtaining his consent to the execution of the plan. That official was of opinion that the power of the company to make the investment was to be determined and controlled by Acts 1907, chapter 458, and that under the terms of that act a domestic life insurance company may only acquire and hold such real estate as shall be requisite for convenient accommodation of the company in the transaction of its business; and, further, that as the plan called for an investment in the lot and the structure of a sum much in excess of the capital stock and surplus of the company, and of the further fact that the building proposed, ten stories high, would exceed the needs of the company for its accommodation, presently and for several years to come, the execution of the plan was not warranted by the law. His approval or assent was therefore withheld, so far as it may have been requisite.

Both of the parties were, however, desirous of having the act above referred to construed, and of having an opinion of the court respecting the right of the company to proceed as having power under its charter or under said act to make the proposed investment, and also in respect of the powers of the insurance commissioner in the premises. Accordingly, an "agreed case"

State Life Ins. Co. v. Dunbar.

was made up and submitted to the chancery court of Hamilton county in order to such a determination. The chancellor's opinion and decree were favorable to the company. As a part of the agreed case, four inquiries were submitted for the court to answer, but we think they may be reduced to two:

(1) Has complainant company power, under its charter and the statutes of the State, to acquire unimproved realty and erect thereon a home office building which would be in excess of its present needs or its needs in the immediate future; and at a total cost in excess of its capital stock and surplus?

(2) If so, is it necessary, as by way of condition, for the company to procure the approval or assent of the insurance commissioner of the State to proceed with the execution of such power?

By its charter the company has power and authority to purchase and hold any real estate necessary for the transaction of the corporate business. Code (Shannon), sec. 2272; Acts 1881, ch. 126.

Acts 1907, chapter 458, is entitled "An act to regulate the investment of the funds of domestic life insurance companies," and its first section provides that no such company shall subscribe to or participate in any underwriting of the purchase or sale of securities or property or to enter into any such purchase or sale on account of said company jointly with another; and that "the disposition of its property shall be at all times within the control of its board of directors."

State Life Ins. Co. v. Dunbar.

“No investment or loan, except policy loans, shall be made by any such life insurance company, unless the same shall first have been authorized by the board of trustees or by a committee thereof charged with the duty of supervising such investment or loan.”

The act then provides further:

“Sec. 2. Be it further enacted, that domestic life insurance companies may invest their funds and accumulations in bonds of the United States, or of this State, or of any other State, or of any county of this or any other State, or of any incorporated city or town of this or any other State, or in the mortgage bonds of any dividend-paying railway or street railway company duly incorporated and organized under the authority of this State or any other State or in other good and solvent securities subject to the approval of the insurance commissioner of this State; and such companies may loan their funds upon improved, unincumbered real property in any State, not exceeding, however, fifty per centum of the value of such property, or upon security or promissory notes amply secured by pledge of any bonds or other securities in which such companies are hereby authorized to invest their funds, or upon the security of their own policies: Provided, the loan upon any policy shall not exceed the reserve value thereof.

“Sec. 3. Be it further enacted, that domestic life insurance companies may acquire, hold, and convey real property only for the following purposes and in the following manner:

State Life Ins. Co. v. Dunbar.

“1. Such as shall be requisite for convenient accommodation in the transaction of business.

“2. Such as shall have been mortgaged to it in good faith by way of security for loans previously contracted or for moneys due.

“3. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

“4. Such as shall have been purchased at sales on judgments, decrees, or mortgages obtained or made for such debts.

“All such real property specified in subsections 2, 3, and 4 of this section, which shall not be necessary for its accommodation in the convenient transaction of its business shall be sold and disposed of within two years after the company shall have acquired title to ~~the~~ same, or within two years after the same shall have ceased to be necessary for the accommodation of its business; and it shall not hold such property for a longer period unless it shall procure a certificate from the Insurance Commissioner authorizing an extension of time for the sale of such property. The insurance commissioner is hereby authorized to issue such a certificate extending the time for the sale of such property if in his judgment it appears that the interest of the company will suffer materially by a forced sale of such property.

“Sec. 4. Be it further enacted, that no domestic life insurance company shall invest or loan its funds in any manner except as provided in this act.”

State Life Ins. Co. v. Dunbar.

In response to the first query: This court had occasion, in the recent case of *Fourth National Bank v. Stahlman*, 132 Tenn., 367, 178 S. W., 942, to discuss the power of a national bank to acquire a stockholding interest in a corporation projected to erect and own a skyscraper building, the first floor only of which was to be occupied by it as banking quarters. It was held that such acquisition was not *ultra vires*.

The case of *Brown v. Schlier*, 118 Fed., 981, 55 C. C. A., 475, was there cited and followed. In that case a national bank erected, at a cost in excess of the capital stock, a four-story building, intending to utilize the upper stories as offices to be rented to others by the bank.

The federal statute governing national banks is stricter than is the act of 1907, above quoted, since it provides that a national bank shall have power to purchase and hold such real estate as is necessary for its "immediate" accommodation in the transaction of its business.

The circuit court of appeals, however, said:

"Nor do we perceive any reason why a national bank, when it purchases or leases property for the erection of a banking house, should be compelled to use it exclusively for banking purposes. If the land which it purchases or leases for the accommodation of its business is very valuable, it should be accorded the same rights that belong to other landowners of improving it in a way that will yield the largest income, lessen its own rent, and render that part of its funds

State Life Ins. Co. v. Dunbar.

which are invested in realty most productive. There is nothing, we think in the National Bank Act, when rightly construed, which precludes national banks, so long as they act in good faith, from pursuing the policy above outlined.”

In *People v. Pullman Palace Car Co.*, 175 Ill., 125, 51 N. E., 664, 64 L. R. A., 366, the State of Illinois, through her attorney-general, called in question the power of the Pullman Company to erect a ten-story business block at a cost of \$2,000,000, three-fourths of the floor space of which was to be held for rent to others. The company was authorized by its charter to purchase and hold “such real estate as may be necessary for the successful prosecution of its business.” The court, sustaining the company’s plea setting out its claims to justification, said:

“The right of the appellee to construct an office building is indisputable, as so, also, is the right to select the most eligible and desirable site. It would be but a narrow and wholly unjustifiable view of this power to insist that in planning and constructing the building the corporation should leave out of consideration its probable prospective requirements, and should erect a building containing only as many rooms and offices as its present business might demand. The corporation had the right, as we think, to look to and prepare for the future. It was but true economy to do so, and if it proceeded in good faith, as we are to assume from the conceded averments of the plea it did, no reason is perceived why it should be deemed bound

State Life Ins. Co. v. Dunbar.

by law to permit such parts of the building as are not for the present required for the accommodation of its business, to remain vacant, but, on the contrary, that it might lawfully obtain such income from the rents of such rooms as might be possible until the growth or increase of its business demanded the additional rooms or offices. A corporation could not be permitted, under mere color and pretense of furnishing accommodations for the transaction of its own affairs, to construct houses or rooms for the purpose of renting the same, and engage in renting such houses or rooms as a business, if such pursuit was, as it here clearly is, beyond and distinct from that it was created to pursue and accomplish. But the averments of the plea do not justify the imputation that the acts of the company under consideration are but colorable, and in this investigation the averments stand confessed by the State.”

The above case was followed in the later case of *Rector v. Hartford Deposit Co.*, 190 Ill., 380, 60 N. E., 528, which involved a like charter power and an effort thereunder on the part of a deposit company to erect a fourteen-story building, only a small part of which was for the accommodation of the company's own business.

A broad discretion must be accorded the directors of such a corporation in respect of the character of the building it shall erect for its corporate home. They should as of right take under consideration future necessities and contingencies, provided this be done in good faith and not as a cloak to a speculative invest-

State Life Ins. Co. v. Dunbar.

ment. *People v. Pullman Palace Car Co.*, supra; *Simpson v. Westminster Palace Hotel Co.*, 8 Ho. Lords Cas., 712; 3 Thomp. Corp. (2d Ed.), sec. 2387.

Lord Chancellor Campbell in the *Westminster Palace Hotel Company Case*, where part (one hundred and sixty-nine rooms) of a large hotel building was leased to a branch of the government for offices, and the action was brought in question by a shareholder, said:

“Under this agreement the directors do not abandon the undertaking for which the company was established, and they cannot be said to engage in any new undertaking. . . . As there is neither abandonment nor extension of the original undertaking, and the arrangement may assist, instead of obstructing the prosecution of the original undertaking. I must advise your lordships to affirm the decree appealed against.”

Furthermore, only the State (and in particular cases the stockholder) may be heard to question the powers of a corporation in such case.

The proposed action is not wholly beyond or outside the scope of the Life Insurance Company's corporate powers, express or implied, and entirely foreign to the purposes of its creation. The ownership of a home office building clearly falls within the statutory grant of power (subsection 1) to hold real estate “requisite for convenient accommodation in the transaction of business.”

Not being an effort to engage in a business which, under any and all circumstances, is beyond its power,

State Life Ins. Co. v. Dunbar.

no one but the sovereign may impeach the corporate action as being *ultra vires*. *Rector v. Hartford Deposit Co.*, supra; *Farmers', etc., Bank v. Western, etc., Co.*, 215 Pa., 115, 64 Atl., 374, 114 Am. St. Rep., 949 (involving the power of a bank to construct a twenty-two story building); 3 Thomp. Corp. (2d Ed.), secs. 2390, 2391; *Barrow v. Nashville, etc., Turnpike Co.*, 9 Humph. (28 Tenn.), 304; *Searight v. Payne*, 1 Tenn. Ch., 186; *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S., 405, 5 Sup. Ct. 213, 28 L. Ed., 733.

Passing to a consideration of the second query: We fail to find in the quoted statute any power vested in the insurance commissioner to put a veto on any such corporate plans. Investments in bonds and other securities are expressly made subject to his approval; but even loans on real estate as security, it might be contended with much reason, are not.

We think this statute should be read in the light of the development of legislation in this country having to do with the investment of funds by life insurance companies. In those States where the largest of these companies have *situs*, not infrequently the legislatures have undertaken to specify by name the bonds and stocks such concerns may invest in. In this State, instead of scheduling such securities, investment in the same is stipulated to be on or with the approval of the commissioner.

By our statute, and generally elsewhere so far as we are advised, the acquisition and improvement of real estate for such a company's headquarters is not made

State Life Ins. Co. v. Dunbar.

to fall under the control of the insurance commissioners or insurance department of the State.

Indeed, by the last paragraph of section 3 of the above act, a limited control is given the insurance commissioner in respect of real estate otherwise acquired (subsections 2, 3, and 4), but it is manifest that the legislature did not intend that such control, or the power of veto, should affect property such as that here in question, the power to own which is governed by subsection 1 of section 3, and the company's charter.

The Code (Shannon, sec. 5165 *et seq.*) lodges with other officials of the State the power to call in question before the courts any excess of corporate action. *State ex rel. v. Turnpike Co.*, 3 Tenn. Ch., 163; *State ex rel. v. Turnpike Co.*, 112 Tenn., 617, 79 S. W., 798, and cases cited.

We do not conceive that in the passage of the legislative act, now under construction, it was any part of the intent of the legislature to shift or divide the responsibility thus devolved by the Code on the law officers of the State. Certainly it was not the purpose to put it in the power of an insurance commissioner to decide absolutely whether such an investment constitutes an abuse of corporate power. That is a matter for the courts to pass upon, when the question is raised as above indicated. *Insurance Co. v. Craig*, 106 Tenn., 624, 642, 62 S. W., 155.

We therefore are of opinion that the answer to the second question should be, as it was below, in the negative.

The result is an affirmance of the decree passed by the chancellor.

Smith v. Haire.

JOE J. SMITH *et al.* v. BETTY HUMES HAIRE *et al.**

(*Knoxville*. September Term, 1915.)

1. WILLS. Probate. Costs.

An executor who in good faith propounds a will for probate is entitled to his costs and attorney's fees whether the will is set aside or not. (*Post*, pp. 346, 347.)

Cases cited and approved: *Lassiter v. Travis*, 98 Tenn., 330; *Douglass v. Baber*, 83 Tenn., 665; *Smith v. Harrison*, 49 Tenn., 230; *Bowden v. Higgs*, 77 Tenn., 346; *Cornwell v. Cornwell*, 30 Tenn., 487; *Delegise v. Morrissey*, 142 Wis., 234; *In re Jones*, 166 Cal., 147.

2. WILLS. Probate. Costs.

Where a will was procured by fraud and undue influence, and the executrix who propounded it for probate was the chief beneficiary, and was responsible for the fraud, she is not entitled to costs on the theory that she propounded the will in good faith. (*Post*, pp. 346, 347.)

3. BANKS AND BANKING. Certificates of deposit. Construction. "Or."

Notwithstanding Acts 1899, ch. 94, sec. 8, subd. 5, declaring that a promissory note may be made payable to one or some of several payees, a certificate of deposit payable to a husband or wife, naming them, must, in view of the fact that the husband used the word "or" as synonymous with "and," be construed as payable to the husband and wife. (*Post*, pp. 347-351.)

Acts cited and construed: Acts 1899, ch. 94, subsec. 5, sec. 8.

Cases cited and approved: *Ransom v. Rutherford County*, 123 Tenn., 1; *Bird v. State*, 131 Tenn., 518; *Blanchenhogan v. Blundell*, 2 B. & Ald., 417; *Carpenter v. Farnsworth*, 106 Mass., 561; *Walrad v. Petrie*, 4 Wend. (N. Y.), 575; *Musselman v. Oakes*, 19 Ill., 81; *Willoughby v. Willoughby*, 5 N. H., 244; *Spaulding v. Evans*, Fed. Cas. No. 13, 216; *Walrad v. Petrie*,

*On allowance of attorney's fees in suit for administration of decedent's estate see note in 54 L. R. A., 820.

Smith v. Haire.

4 Wend. (N. Y.), 575; Quinby v. Merritt, 30 Tenn., 439; Estate of William Parry, 188 Pa., 33; Farrelly v. Emigrant Savings Bank, 92 App. Div., 529.

4. HUSBAND AND WIFE. Obligations. Survivorship.

Where an obligation is in favor of a husband and wife such joint security or chose in action survives to the wife as against the personal representative of the husband, though the consideration therefor passed from the husband. (*Post*, pp. 351, 352.)

Cases cited and approved: Johnson et al. v. Lusk, Exr., et al., 46 Tenn., 113; McMillan v. Mason & Sherrill, 45 Tenn., 263; Pile v. Pile, 74 Tenn., 508.

5. HUSBAND AND WIFE. Wife's choses in action. Reduction to possession.

That a husband who had a certificate of deposit made payable to himself and wife retained it in his possession does not show a reduction to possession destroying the wife's rights of survivorship. (*Post*, pp. 351, 352.)

6. HUSBAND AND WIFE. Wife's choses in action. Reduction of possession.

Where a husband who had a certificate of deposit made payable to himself and wife made a will carrying with it disposition of such certificate, the execution of the will, which instrument was ambulatory and did not speak until the husband's death, did not amount to a reduction of the chose in action to possession, destroying the wife's right of survivorship. (*Post*, pp. 352-357.)

Cases cited and approved: McElhatton v. Howell, 5 Tenn., 19; Cox v. Scott, 68 Tenn., 305; Rice v. McReynolds, 76 Tenn., 37; Smith v. Smith, 98 Tenn., 102; Prewitt v. Bunch, 101 Tenn., 723; Swiney v. Swiney, 82 Tenn., 316; Swails v. Bushart, 39 Tenn., 561; Johnson v. Johnson, 103 Tenn., 32; Nash v. Nash, 2 Maddock, 133; Blount v. Bestland, 5 Ves., 515.

Cases cited and distinguished: Dummer v. Pitcher, 2 My. & K., 262; Pile v. Pile, 74 Tenn., 512.

Smith v. Haire.

FROM MONROE.

Appeal from the Chancery Court of Monroe County.
—FOSS H. MERCER, Chancellor.

R. H. SANSOM and JOHN W. GREEN, for appellants.

JEROME TEMPLETON and DAVID C. YOUNG, for appellees.

MR. JUSTICE GREEN delivered the opinion of the Court.

This litigation arises out of the settlement of the estate of the late J. T. M. Haire, of Monroe county.

Mr. Haire died, leaving a will by which he devised and bequeathed all his estate to his wife, Betty Humes Haire, absolutely. This will was contested on the ground of mental incapacity of testator and fraud and undue influence. The will was set aside and this judgment affirmed by the court of civil appeals, and later by this court.

Another will of Mr. Haire's, made before the one contested, was then set up. In the former will, which was the one finally established, Mr. Haire gave his estate to his wife for life, with the remainder to certain relatives of his own.

In the controversy now before us two questions arise: First, the liability of Mr. Haire's estate for attorney's fees incurred by Mrs. Haire as executrix in the contest

Smith v. Haire.

over the will that was set aside; and, second, whether certain certificates of deposit issued by two of the Knoxville banks payable to J. T. M. Haire or Betty Humes Haire passed under the will admitted to probate, or whether Mrs. Haire took these certificates in her own right as survivor of her husband.

In regard to attorney's fees, it is well settled in Tennessee that an executor who in good faith propounds a will for probate is entitled to his costs and attorney's fees, whether the will be set aside or not. *Lassiter v. Travis*, 98 Tenn., 330, 39 S. W., 226; *Douglass v. Baber*, 15 Lea, 665; *Smith v. Harrison*, 2 Heisk., 230; *Bowden v. Higgs*, 9 Lea, 346; *Cornwell v. Cornwell*, 11 Humph., 487.

In *Lassiter v. Travis*, supra, it appeared that the executrix of the will there contested was the principal beneficiary thereof, and, although the will was set aside, this court held she was entitled to her costs and attorney's fees out of the estate. The court said that:

“Good faith, rather than pecuniary interest, on the part of the acting executor, is the controlling question in such a case.”

It does not appear from the report of *Lassiter v. Travis*, supra, upon what ground the will was set aside.

The will of J. T. M. Haire, of which his wife was sole beneficiary and executrix, was set aside on the ground, partly at least, of fraud and undue influence. There was evidence before the jury which this court at a former term thought sustained the jury's conclusions

Smith v. Haire.

respecting the will. Such evidence indicated that, if Mrs. Haire herself did not resort to such means, undue and fraudulent influence was exerted over the testator by certain of her relatives in her behalf, for whose acts she must be charged with responsibility.

It cannot be said that the beneficiary of a will procured by fraud and undue influence, for which she is responsible, is acting in good faith when she attempts to have such a will set up. In such a case costs and counsel fees must be disallowed to the executrix when the will is set aside. 40 Cyc., 1362; *Deleglise v. Morrissey*, 142 Wis., 234, 125 N. W., 452; *In re Jones*, 166 Cal., 147, 778, 135 Pac., 293.

We do not mean to say that we will disallow such costs and attorney's fees in every case wherein a will may be set aside on the ground of fraud and undue influence, even though the executor or executrix may be the sole beneficiary. A case may arise in which the jury would find fraud and undue influence with enough evidence to require an approval of such a verdict by the court, and yet there might be in such a case circumstances that would justify the attempted probate of the will in good faith. In the case before us, however, we are satisfied with the judgment of the court of civil appeals disallowing the counsel fees. That court has discussed the evidence at length, and we considered the evidence on the hearing of the will contest, and it is not necessary to go over it again.

The certificates of deposit in litigation were two in number. One was issued by the East Tennessee Na-

Smith v. Haire.

tional Bank, of Knoxville, for \$4,500. The other was issued by the Mechanics' Bank & Trust Company, of Knoxville, for \$6,500. Both certificates recited a deposit by J. T. M. Haire, and were payable to the order of the said J. T. M. Haire or Betty Humes Haire.

The money represented by these certificates of deposit came from the estate of Mr. Haire. The certificate of deposit in the Mechanics' Bank & Trust Company consisted of several smaller deposits previously made by Mr. Haire in his own name. They were combined, and at the request of Mr. Haire a certificate was issued for the aggregate sum payable to himself or his wife, as before stated. The deposit in the East Tennessee National Bank was made by Mr. Haire at one time, and a certificate issued payable to himself or wife.

The evidence in the record throws little light upon Mr. Haire's intentions in having these certificates of deposit issued to the order of himself or his wife. Mrs. Haire said that he told her he had the certificates issued in this way so that she might be able to get ready money easily. Just what this means we are not able to say, nor is there any other distinct proof in the record from which we might gather the purpose of the deceased in taking the certificates out in such form.

So we must consider the legal effect of these certificates so written without any particular aid from extrinsic proof, except certain letters written by Mr. Haire to the banks.

Smith v. Haire.

The first question that arises is upon the meaning to be given to the conjunction "or" in the certificates. Is it to be considered as having been used in the sense of "and"? We think the word was so used.

The words are often convertible, and are frequently so treated in the construction of statutes and written instruments, when good sense requires. *Ransom v. Rutherford County*, 123 Tenn., 1, 130 S. W., 1057, Ann. Cas., 1912B, 1356; *Bird v. State*, 131 Tenn., 518, 175 S. W., 554.

It was formerly held in several jurisdictions that a note payable to A. *or* B. was not good as a promissory note, because of the uncertainty of the payee. *Blanchenhogan v. Blundell*, 2 B. & Ald., 417; *Carpenter v. Farnsworth*, 106 Mass., 561, 8 Am. Rep., 360; *Walrad v. Petrie*, 4 Wend. (N. Y.), 575; *Musselman v. Oakes*, 19 Ill., 81, 68 Am. Dec., 583.

Other cases treated such a note as though written payable to A. *and* B. So read, the note would be evidence of an obligation to the payees jointly, and suit could be maintained thereon by both payees, but not by one. *Willoughby v. Willoughby*, 5 N. H., 244; *Spaulding v. Evans*, Fed. Cas., No. 13216. This view was really approved in *Walrad v. Petrie*, 4 Wend. (N. Y.), 575, but the court felt bound by the cases referred to above.

This court very distinctly adopted the New Hampshire construction in the early case of *Quinby v. Merritt*, 11 Humph., 439. In that case a certain written obligation was indorsed to the order of C. W. or W. L.

Smith v. Haire.

Nance. C. W. Nance alone undertook to transfer it. This court said that, while such a paper was not valid as a promissory note, "yet it is evidence of a contract for the payment of money, and according to the cases referred to, and especially that in 5 N. H., is evidence of a contract with both the payees jointly; and they have, therefore, a joint interest in the fund secured by such note." The court accordingly held that a suit could not be maintained by the indorsee C. W. Nance; that it was necessary for C. W. and W. L. Nance both to indorse the paper to effect a valid transfer.

See, also, *Estate of William Parry*, 188 Pa., 33, 41 Atl., 448, 49 L. R. A., 444, 68 Am. St. Rep., 847; *Farrelly v. Emigrant Savings Bank*, 92 App. Div., 529, 87 N. Y. Supp., 54.

While subsection 5, section 8, chapter 94, Acts 1899 (Negotiable Instruments Act), provides that a promissory note may now be made payable to "one or some of several payees," the statute does not undertake to define the interests of such payees in the obligation, and we do not think it invariably precludes us from construing such an obligation to be one in which the payees have a joint interest.

In the particular case before us such a construction is clearly correct.

Looking to the correspondence of Mr. Haire with the banks, when these certificates were issued, it appears beyond doubt that Mr. Haire himself used the conjunctions "or" and "and" as convertible words in arranging about these deposits. It is conceded that

Smith v. Haire.

he had the same intention with reference to both deposits. In his correspondence with the Mechanics' Bank & Trust Company we find him requesting that certificates be issued payable to the order of himself *or* wife, and in two of his letters to the East Tennessee National Bank about the deposit there he requests that the certificate be issued to the order of himself *and* wife. Both banks made the certificates payable to Haire *or* his wife. We think these letters of his show conclusively that he attached no such significance to the word "or" in the certificates of deposit, as counsel for complainants ascribe to the use thereof, but, on the contrary, his letters very clearly show that he took no distinction between the words "or" and "and" in this connection, and neither did the East Tennessee National Bank.

It thus appearing to us that the certificates of deposit must be dealt with as if payable to Mr. Haire *and* his wife, there would be little more difficulty in the case were it not for Mr. Haire's will, which has been admitted to probate.

Where an obligation is taken to husband and wife, such joint security or chose in action survives to the wife as against the personal representative of the husband. It makes no difference whether the consideration of the chose in action passes from the husband or not. The form of the security implies a design on the husband's part to benefit the wife, and the law will effectuate this design. While during her lifetime the husband might reduce this joint chose in action to

Smith v. Haire.

possession just as he could the wife's individual chose in action, if he fails to make such reduction to possession during coverture, such security will survive to his wife. These propositions are too firmly established to necessitate elaboration. *Johnson et al. v. Lusk, Ex'r, et al.*, 6 Cold., 113, 98 Am. Dec., 445; *McMillan v. Mason & Sherrill*, 5 Cold., 263, 98 Am. Dec., 401; *Pile v. Pile*, 6 Lea, 508, 40 Am. Rep., 50; 21 Cyc., 1197.

Mr. Haire did nothing in his lifetime which would amount to a reduction to possession of these certificates of deposit; in fact, they were renewed, each of them, repeatedly, and each time renewed payable to himself or his wife. In this way he continued to recognize her joint interest therein until the time of his death.

It is true that he kept such certificates of deposit in his possession, but mere possession by the husband does not amount to a reduction into possession. 21 Cyc., 1182; Bishop on Married Women, secs. 119, 120.

But it is insisted that Mr. Haire undertook a disposition of these certificates of deposit by the will which has been set up as valid. While the will does not mention said certificates of deposit *eo nomine*, still it may be fairly conceded upon the facts appearing in this case that it was the testator's intention to dispose of these securities by this instrument.

Can a husband who fails to reduce his wife's chose in action to possession during coverture dispose of such property by will and defeat her right of survivorship? We think not, and this we are forced to say,

Smith v. Haire.

although such conclusion conflicts with a previous expression by this court.

The general rule announced in numerous cases is that marriage amounts to a qualified gift only of the choses in action which the wife possesses at the time of the marriage or thereafter acquires, and to perfect his title and make certain his rights thereto, so as to defeat the wife's right of survivorship, there must be a reduction to possession by the husband during coverture. *McElhatton v. Howell*, 5 Tenn. (4 Hayw.), 19; *Cox v. Scott*, 68 Tenn. (9 Baxt.), 305; *Rice v. McReynolds*, 76 Tenn. (8 Lea), 37; *Smith v. Smith*, 98 Tenn., 102, 38 S. W., 439, 60 Am. St. Rep., 838; *Prewitt v. Bunch*, 101 Tenn., 723, 50 S. W., 748.

In *Pile v. Pile*, 74 Tenn. (6 Lea), 508, 40 Am. Rep., 50, the husband executed a will in which he disposed of a chose in action payable to his wife and himself jointly. The court recognized the wife's right of survivorship in such a joint security, and quoted from 1 Daniel's Neg. Inst., sec. 257, to the effect:

"That any act of the husband during marriage manifesting a distinct purpose to make his wife's chose in action his own operates as a reduction into possession and bars her right of survivorship; but mere intention, unaccompanied by act, will not suffice."

The court then said:

"It is true as a will to convey to his devisees and legatees his property it only took effect to vest them with rights at his death; but as an act declaratory of his purpose and intention that certain named persons

Smith v. Haire.

should have this note or its proceeds it was done and completed before his death. It certainly was an 'act of the husband during marriage manifesting a distinct purpose to make his wife's choses in action,' or rather his own choses in action, subject to his exclusive control and disposition, and thus to defeat her right of survivorship.

"If to bring suit in his own name, or transfer the note to another, or place it among his valuable papers, claiming it as his own, would be sufficient to defeat his wife's right of survivorship, we are of opinion the declaration of such intention by the act of signing and duly executing his will is sufficient to effect the same object." *Pile v. Pile*, 6 Lea, 512, 40 Am. Rep., 50.

We are unable to follow this reasoning of the learned judge.

As is conceded, a will is of no effect until after the death of the testator. *Swiney v. Swiney*, 14 Lea, 316; *Swails v. Bushart*, 2 Head, 561; *Johnson v. Johnson*, 103 Tenn., 32, 52 S. W., 814.

We have just seen that there must be some act amounting to a reduction to possession during coverture in order to bar the wife's right of survivorship, and, as the court said in *Pile v. Pile*, supra, a mere intention, unaccompanied by an act, will not suffice.

The drafting of a will is not a definite or positive act in the sense of the law. Drawing a will can have no effect on the title to property. No *status* is changed thereby. The effect of a will is postponed until after

Smith v. Haire.

the death of the testator, when the marriage relation between the testator and his wife is at an end.

Reduction to possession must be by an act certain, definite, and positive. A will is ambulatory. The incorporation in a will or a provision disposing of his wife's unreduced choses in action is the mere expression of an intention on the part of the husband to transfer them or assign them after his death—after coverture has ended, when his power over them is gone.

The authorities say that the husband's intention to reduce the wife's choses "must be followed by some positive act changing the property and divesting it out of the wife." Bell, Husband and Wife, 55, 56; Bishop on Married Women, 111; Schouler's Domestic Relations, sec. 84.

The mere making of a will cannot divest the wife's interests nor change the *status* of her property; for the will does not speak nor operate until the husband has passed into that realm where there is neither "marrying or giving in marriage," and he is beyond the exercise of any marital right or earthly act.

The case of *Pile v. Pile*, supra, is without any authority to support it.

In *Nash v. Nash*, 2 Maddock, 133, 56 Eng. Rep., 284, and in the case of *Blount v. Bestland*, 5 Ves., 515, 31 Eng. Rep., 719, attempts were made to dispose of the wives' unreduced choses by the husbands' wills. It was not contended in either case that the making of these wills amounted to a reduction, and the effort of counsel was to show that the choses had been reduced

Smith v. Haire

by certain acts during coverture. Such acts were held insufficient, the wives' rights of survivorship were sustained, and the provisions in the wills respecting the securities in question were given no effect whatever.

In *Dummer v. Pitcher*, the testator had taken certain stocks in the joint names of his wife and himself. It was insisted that this stock passed under his will. It was held by the Vice Chancellor, Sir L. Chadwell, that the wife, "by surviving her husband, became absolutely entitled to the sums of stock." *Dummer v. Pitcher*, 5 Sim., 35, 58 Eng. Rep., 251.

This case was appealed and affirmed. In his disposition of the appeal Lord Chancellor Brougham said:

"It was further contended that the circumstances of the testator's power over the chose in action continuing after the transfer and up to his death differs in this from the case of advancement to a child. But there is a great fallacy here, as it seems to me. The testator's power may have continued, but in what capacity? As husband and in the exercise of his marital right. Then suppose it to be admitted that he might have reduced the stock (a chose in action) into possession by having had it retransferred into his own name during his lifetime, still the argument is not at all advanced, for it is not pretended that anything was done after the first transfer, the stock standing in the joint names at the date of the will, and at the death of the testator. The husband makes the will which is said, indeed, not to relate to the stock. But, suppose with a view to this part of the argument, we were to admit that it did; the

Smith v. Haire.

wife's right would survive nevertheless. I have no doubt whatever that the stock survived to the wife." *Dummer v. Pitcher*, 2 My. & K., 262, 39 Eng. Rep., 944.

It thus seems that, upon reason and authority, *Pile v. Pile* on this point must be overruled. The will of the husband was not effective to cut off Mrs. Haire's right of survivorship in these certificates of deposit, which we have held to be joint choses.

It results that the decree of the court of civil appeals in this respect was erroneous, and must be reversed. The costs of these proceedings will be divided between the parties.

McCravy et al. v. State.

GEORGE W. MCCRAVY and PEARL LASTER v. THE STATE
OF TENNESSEE.

(*Knoxville*. September Term, 1915.)

1. **HOMICIDE. Offenses. Evidence. Sufficiency.**

In a prosecution for assault with intent to commit murder in the first degree, evidence *held* insufficient to warrant conviction. (*Post*, pp. 366, 367.)

2. **CRIMINAL LAW. Evidence. Expert testimony.**

In a prosecution for assault with intent to commit murder in the first degree, a medical expert, while qualified to testify as to the range of the bullet, is not qualified to testify that the prosecuting witness, who was found with the revolver in her hand, could not have inflicted the shot herself, for that was the ultimate question for the jury, and any person reasonably familiar with firearms could draw as accurate a conclusion as the medical expert. (*Post*, pp. 367-369.)

Case cited and approved: *Telephone & Telegraph Co. v. Mill Co.*, 129 Tenn., 374.

FROM GREENE.

Error to the Circuit Court of Greene County.—DANA HARMON, Judge.

SUSONG & BIDDLE, SWINGLE & SUSONG and J. AUTHUR ATCHLEY, for plaintiffs in error.

WM. H. SWIGGART, JR., Assistant Attorney-General,
for the State.

McCravy et al. v. State.

MR. JUSTICE FANCHER delivered the opinion of the Court.

The defendants were indicted jointly for assault with intent to commit murder in the first degree upon Mrs. George W. McCravy. The two defendants were convicted of the charge.

On Thanksgiving Day, November 26, 1914, Mrs. McCravy, wife of defendant George McCravy, was shot in the arm and head. The doctor who attended her stated that the ball entered the left side of the head above the left ear and to the front near the temple, ranging about half an inch downward, coming out on the other side of the head. The next day he discovered a bullet wound also in her left arm above the elbow, and he stated that this wound indicated that the ball had entered from the outside of the arm, coming out on the inside next to the body. The theory of the State was that both these wounds were from one pistol shot, and that her left arm was evidently thrown up to guard against the assault when both wounds were received.

The proof is entirely circumstantial. George McCravy and Pearl Laster had been on intimate terms for some months prior to the shooting, and he admits illicit relations with her. The sister of Mrs. McCravy had been staying to assist in the household work, Mrs. McCravy being an invalid; but there was some little friction between the two sisters, and she left. Thereupon Pearl Laster was employed and had remained in the household for some two months previous to the

McCravy et al. v. State.

shooting. At one time she had been forced to leave by relatives of Mrs. McCravy. One of these relatives who compelled her to leave was also shown to have been unduly intimate with Pearl Laster. McCravy visited her while she was away, probably twice. It seems that the wife of McCravy made no objection to the Laster woman staying with her, and they got along amicably. Whatever illicit relations there were between Pearl Laster and George McCravy seem to have been with the consent of Mrs. McCravy, although defendant said that no such relations were maintained while the Laster woman was in the household. The proof shows, and Mrs. McCravy admitted on the witness stand, that she was not averse to her husband maintaining illicit relations with other women because of the fact that she was an invalid.

The night before the shooting McCravy came home with some whisky, which he stated was for his wife. The proof shows that she drank whisky and so did he. She testified that her husband was always kind to her, and also that the Laster woman was kind to her and the children. The next morning Mrs. McCravy, Mrs. Laster, and the children arose and had breakfast. Shortly after breakfast, Mrs. McCravy went out to the closet, a short distance from the house, where the shooting took place. The State introduced a number of witnesses showing illicit relations between McCravy and the Laster woman, consisting of admissions made by him, and two letters alleged to have been written by him to her in very endearing terms. Mrs. Laster and

McCravy et al. v. State.

Mr. McCravy and the nine year old son of the McCravys, named Cubert, made statements immediately after the shooting as to how it occurred. Mrs. Laster did not go upon the witness stand. The State introduced Mrs. McCravy, but she remembers nothing about the occurrence and has no recollection of what transpired the night before, or that morning. Soon after the shooting, the defendants were arrested, and the defendant George McCravy was placed in jail. After that time he did not see his wife and son and had no communication with them. They had been taken by his wife's people, with whom they stayed until the trial. The attorney for McCravy did not see the little boy until the day before he was introduced as a witness by the defendant, and was then only permitted to talk with him in the presence of the physician, Dr. Myers, who was a disinterested party. The boy made his statement without suggestion from the attorney, and in effect it was the same that he had made immediately after the shooting and to other parties, and was the same as statements made by George McCravy and the Laster woman on the same day of the shooting. He said that he had been told to go to the spring by his mother and Mrs. Laster. This spring was shown to have been about two hundred yards southwest of the house. He said that his mother was in the house when he left, and that when he returned and had reached the gate he heard a pistol shot up about the closet, which was north of the house. He went in and asked the Laster woman who shot, and she replied that she did

McCravy et al. v. State.

not know and did not care. He was then told to cut some firewood, and went out to a place between the house and the closet where he was engaged in chopping off a stick. When he had about half finished cutting the stick in two, he saw his mother coming out of the closet door, letting a pistol drop from her hand as she started; that she came outside and fell beside the door. He then began to scream for his father to come. He said that his father was in bed at the time; that he had noticed him just before he went out of the house in the same position he had been lying from the time he (the boy) got up before breakfast, apparently asleep. The father hurriedly put on his pants and socks and ran out and took hold of his wife and said to her, "What do you mean?" and she laughed and said, "Oh, nothing," and that the "younguns" aggravated the life out of her and she tried to get herself out of the way. Defendant carried her in the house and placed her on the bed and immediately telephoned for the doctor. When the doctor and others arrived, defendant gave his statement, which was practically the same as that told by the little boy. Mrs. McCravy said that she did not shoot herself, but upon further examination she indicated that she only meant by this that she did not know anything about shooting herself, and that she had no recollection whatever in regard to it. She said that she started to see her husband before the trial, but that her brother would not let her go, and that she had not talked to her husband since she was hurt. She said that she knew how to

McCravy et al. v. State.

fire the pistol, which was a Colt's automatic; that "all you had to do was just to pull the trigger." She had previously fired the pistol.

Dr. Myers testified that the Laster woman told him that Cubert was at the wood pile chopping wood, as stated by Cubert, and he (Dr. Myers) went out and saw the stick which had been half cut in two by the boy.

McCravy's character before this affair came up was shown by all the witnesses to have been good.

The main facts relied upon for the conviction are that Dr. Myers stated that Mrs. McCravy could not have inflicted the wound in her left arm and through the head herself, thus indicating that it must have been done by some one else, and the further theory of the prosecution is that, as McCravy was keeping the Laster woman, it was his desire to get rid of his wife in order to maintain relations with or marry Mrs. Laster.

When Pearl Laster was arrested by the officers, she was induced to make a statement, to the effect that McCravy did the shooting so that she and McCravy could get married; that he tried to get her to do the shooting, but she would not; and that he jumped out of bed and ran out of the house in his nightclothes while Mrs. McCravy was in the closet, shot her, and ran back and jumped in the bed. On the trial, however, the Laster woman was not placed on the stand. After this statement was made by her, witnesses testified that McCravy made statements rather indicating that Mrs. Laster might have done the shooting, but he nowhere admitted that he was awake or knew anything about it

McCravy et al. v. State.

until called by the boy. After the shooting McCravy exhibited considerable emotion, and in speaking of his wife to the doctor his eyes were filled with tears. On the witness stand when he was detailing how he found his wife shot and all about the incident, the stenographic notes show that he wept. The proof is positive and uncontradicted that he got along well with his wife. The Laster woman was married, and it could hardly be supposed that McCravy had any intention of marrying her. Whatever illicit relations that existed were entirely agreeable to Mrs. McCravy, so that we can see no overpowering motive upon the part of McCravy to murder his wife, for whom he seemingly had affection, and who was the mother of his four children. From Mrs. McCravy's testimony it is evident that she does not believe her husband shot her. The boy, Cubert, gave a very clear and rather convincing statement, without any contradiction whatever. So far as the particular facts proven are concerned, they indicate most strongly that Mrs. McCravy fired the shot with suicidal intent. The fact that she does not remember anything about it may be due to the injury to her head, or it may indicate that she was insane at the time. The Laster woman is a vacillating, weak character, of lewd habits, and her statements made to the officers evidently while under pressure, and to which McCravy had no power to cross-examine, are not very conclusive to indicate a conspiracy between the two defendants to commit the crime. So far as her statement could indicate otherwise than to show a conspiracy, it

McCravy et al. v. State.

can only be treated as a confession upon her own part, and not as evidence to show the guilt of McCravy. It was probably nothing more than a weak and forced effort to throw the responsibility upon McCravy and becomes a witness for the State in order to be released from custody herself.

The most difficult fact to get over by the defendant is the testimony of the doctor as to the range of the bullet, the position of the wounds, and his statement that these wounds could not have been inflicted by Mrs. McCravy. However, we are not convinced that it was impossible for Mrs. McCravy to have fired the shot or shots. There could have been more than one shot fired. There is a possibility that the doctor was mistaken as to the range of the ball, although he was probably correct in his conclusion. He gave no reason, however, showing why he knew the ball ranged from the left to the right side. He is evidently an honest, straightforward, and competent man; but we are not convinced from his testimony that he was correct in his conclusion that this ball could not have been fired by Mrs. McCravy, passing through the left arm and through the head as he indicated. He is not shown to be an expert on the use of firearms.

Mrs. McCravy was probably a slender woman. While a stocky built, fleshy person could not without difficulty reach around and fire a shot into the left side of the head, it is very apparent to us that a slender person could do so, and we see no reason why such person could not also fire through the left arm at the

McCravy et al. v. State.

same time. Mrs. McCravy may have used her left arm to shield her face from the fire of the pistol. She could have pulled the trigger with her thumb, holding the stock of the pistol in the same hand, with the weapon pointed toward her head and against the outside of her arm thrown up against the side of her head. The closet where she was shot was very small, and marks upon the side of it, proven by some of the witnesses, indicated that the bullet struck about sixteen inches above the seat where she was probably sitting, and struck the side of the wall to the right as one faces the door. A bullet would not have so ranged if shot from the door. The bullet was afterward found on the floor. A spot of blood was also on the floor.

In view of the positive and uncontradicted testimony as to the material facts in the record, we do not believe the proof sustains the verdict, but rather that there is a preponderance of proof against the verdict, especially when considered in view of the requirement that in order to convict upon circumstantial evidence alone the proof must be so strong and convincing as to exclude every other reasonable hypothesis than that of the defendant's guilt.

There are some assignments of error in the record as to the admission of evidence, consisting of the alleged letters written by George McCravy to Pearl Laster, also proof of certain telephone conversation between McCravy and Pearl Laster; also, as to allowing the State to introduce proof of statement by the defendant Mrs. Laster tending to incriminate, not her-

McCravy et al. v. State.

self, but defendant McCravy after she had refused to testify.

We do not regard these assignments as of sufficient importance to merit a reversal. The Laster woman refused to go upon the stand at the close of the testimony for the State, and testify in her own behalf. Afterward, the State introduced proof as to these conversations, in which Mrs. Laster undertook to incriminate McCravy, and thereafter her attorney asked permission to permit her to go upon the stand, saying that the reason she had not originally taken the stand was that they did not regard the proof against her sufficient to make it advisable for her to testify in her own defense. As to whether she ought to have been permitted to testify after the introduction of these conversations, the court will indicate no opinion, as this will probably not occur again in case there is a new trial. The court will say, however, that it appears she desired to take the stand after these statements were proven, and was not permitted to do so by the court.

There is one assignment of error in regard to admission of testimony which we do deem of sufficient importance to rule upon, and that is as to the alleged error of the court in allowing Dr. Myers to testify, over the objection of defendants, in substance, that it would not have been possible for the injured woman, Mrs. McCravy, to have shot herself in the manner in which she was shot. We think that his testimony was competent giving his opinion as to the range of the bullet. He did not say that he was a man of experience

in the treatment of gunshot wounds, but no exception was taken to his testimony on the ground that he had not qualified as an expert, and we think an expert may properly testify as to the range of a bullet through any part of the human body. That involves a question of anatomy and is sufficiently scientific in its nature as to admit of expert testimony. We are of opinion, however, that it was error to permit him to give his opinion as an expert, or to state as he did, in substance, positively that the bullet could not have been shot by Mrs. McCravy in the manner in which she was shot. Testimony is permissible allowing an expert to state a conclusion or give an opinion on a subject which is peculiarly a matter of superior knowledge on his part, for the reason that the lay mind is not so competent to form an opinion or reach a conclusion. Such expert opinion or conclusion, however, may be permitted only in matters peculiarly within the knowledge of an expert. The question whether a delicate woman can reach around with the right hand and shoot herself in the left side of the head, or whether she can do so at the same time shooting herself through the left arm, is not peculiarly a matter of expert learning upon the part of a physician. This is a conclusion which the ordinary practical mind may reach, as well as the trained physician, and can be more readily reached by one trained in the use of firearms. Whether Mrs. McCravy shot herself was the ultimate fact to be reached by the jury, because if she shot herself it necessarily follows that both defendants were innocent. To permit the

McCravy et al. v. State.

doctor to say whether it was possible for her to do this, when the jury could as well reach the same conclusion, was an invasion of their province. *Telephone & Telegraph Co. v. Mill Co.*, 129 Tenn., 374, 381, 382, 164 S. W., 1145.

It is not a question of anatomy, but a question of the physical use of the hand and arm with a Colt's 25 automatic revolver, as to whether this wound could have been self-inflicted. The doctor introduced by the State may have known very little about the use of such firearms. A slender, wiry person, such as this woman doubtless was, who knew how to use a weapon like this as she did, may have been able to inflict the wound as described by the doctor. The sleeve of the knit under garment through which this bullet passed going through Mrs. McCravy's arm was introduced as an exhibit to the testimony and has been inspected by us, and it is our opinion, from an inspection of the bullet holes and the blood stains upon the garment just above the curve of the elbow of same, that there is a probability that this woman could have fired the bullet through her arm and through the head if her arm was placed against the side of the head, by reaching her right hand around and firing against the arm. It was only a small wound in the arm, going slightly through the lower or back part of the arm.

For the reasons indicated, the case is reversed and remanded.

Gilbert v. Ashby.

PHILLIP D. GILBERT v. W. S. ASHBY *et al.*

(Knoxville. September Term, 1915.)

1. FRAUDULENT CONVEYANCES. Sale in bulk. Partnership property. Notice to individual creditors.

While notice of sale in bulk of a firm's stock in trade to one of the partners should have been given the individual creditors of the selling partner, they cannot attack it as fraudulent; payment of the partnership creditors, assumed by the buyer, consuming the whole stock. (*Post*, pp. 371, 372.)

Cases cited and approved: *Daly v. Drug Co.*, 127 Tenn., 412; *Mahoney-Jones Co. v. Sams Bros.*, 128 Tenn., 207; *Fecheimer-Keifer Co. v. Burton*, 128 Tenn., 682; *Buck Stove Co. v. Johnson*, 75 Tenn., 282; *Fowlkes v. Heirs & Creditors of Bowers*, 79 Tenn., 144; *Jackson Insurance Co. v. Partee*, 56 Tenn., 296; *Carver Gin & Machine Co. v. Bannon & Co.*, 85 Tenn., 712.

2. FRAUDULENT CONVEYANCES. Consideration. Husband and wife.

The undertaking by a wife to personally care for her husband's mother is consideration for his conveyance to her, attacked as fraudulent, of property which had been conveyed to him in consideration that he would care for his mother. (*Post*, pp. 372-374.)

Case cited and approved: *Carpenter v. Franklin*, 89 Tenn., 142.

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.—W. B. JARVIN, Chancellor.

MOORE & DARWIN, for appellant.

LUSK & THOMPSON and WILL J. WATSON, for appellees.

Gilbert v. Ashby.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The bill in the present case was filed by the trustee in bankruptcy of J. H. Hope to set aside as fraudulent certain sales and conveyances made by him. We deem it necessary in this opinion to consider only two of the transactions.

1. J. H. Hope and his daughter, Amanda T. Hope, were partners in a small grocery store, carrying a stock of goods worth between \$900 and \$1,000. On June 1, 1913, they dissolved partnership, the daughter taking the stock and agreeing to pay the partnership debts, except that she permitted her father to take out of the stock \$10 or \$15 worth of goods as the part that would belong to him after the settlement of the debts. The partnership debts amounted to between \$900 and \$1,000, or about the value of the stock. These debts were paid by the purchasing partner, Amanda T. Hope. The complainant represents individual creditors of J. H. Hope. The contention is that Amanda T. Hope is liable for the value of the stock of goods because she did not give notice to all the creditors of her father, as required by the bulk sales law of this State. *Daly v. Drug Co.*, 127 Tenn. (19 Cates), 412, 155 S. W., 167, Ann. Cas., 1914B, 1101; *Mahoney-Jones Co. v. Sams Bros*, 128 Tenn. (1 Thomp.), 207, 159 S. W., 1094; *Fecheimer-Keifer Co. v. Burton*, 128 Tenn., 682, 164 S. W., 1179.

While it is true, as held in *Daly v. Drug Co.*, that the bulk sales law applies to the sale and purchase of an interest in a stock of goods by one partner from another,

Gilbert v. Ashby.

yet this principle can be of no service to the complainant, because the partnership creditors were first entitled to payment over the individual creditors of either member of the firm (*Buck Stove Co. v. Johnson*, 75 Tenn. [7 Lea], 282; *Fowlkes v. Heirs & Creditors of Bowers*, 79 Tenn. [11 Lea], 144, 146; *Jackson Insurance Co. v. Partee*, 56 Tenn. [9 Heisk.], 296; *Carver Gin & Machine Co. v. Bannon & Co.*, 85 Tenn. [1 Pick.], 712, 4 S. W., 831, 4 Am. St. Rep., 803, and cases cited), and, as the payment of this class of creditors by the purchasing partner consumed the whole, or practically the whole, of the stock, there was nothing left for the several creditors of J. H. Hope, the selling partner, and no injury was inflicted upon the complainant representing creditors of the latter class. This point was referred to and reserved in *Mahoney-Jones Co. v. Sams Bros.*, supra, 128 Tenn., 210, 159 S. W., 1094, and in the last of our published cases upon the subject, *Fecheimer-Keifer Co. v. Burton*, supra, it was held that a creditor who was not satisfied could recover from the purchaser only his *pro rata*. Where the whole fund is consumed by creditors having priorities, there can be no *pro rata* left for inferior creditors.

2. The mother of J. H. Hope conveyed to him two lots in Chattanooga, under the consideration that he would support her the rest of her life, would bury her, would place a monument at her grave and at the grave of her deceased husband. Hope received his mother in his home, but was away most of the time, and thus left the care of the mother wholly to his wife. His wife ob-

Gilbert v. Ashby.

jected, and refused to further give attention to the mother unless the lots should be conveyed to her. The mother was old and blind and helpless. Hope had no other means of having his mother taken care of. Under these circumstances he conveyed the property to his wife to secure the performance of the services which he had agreed to perform for his mother. It is insisted that this was but a voluntary gift, inasmuch as the husband had the right to command his wife's services. This right is no better than a fiction as against an unwilling wife, since the law gives no means of compulsion; and if such means were given, few husbands would be found willing to use them.

Under the facts stated, we think the services which the wife undertook to perform furnished a valuable consideration for the deed, and that it could not be considered voluntary. Taking a more technical view of the matter, it may be said that the husband had the right in good faith to bestow upon his wife his right to her own services as separate estate, and then to contract with her for the performance to him of those services as a consideration for property conveyed to her. No creditor could object to such an arrangement made in good faith because he could not be harmed, since in no event could he command the services of the wife, through the husband or in any other way. This is within the principle of *Carpenter v. Franklin*, 89 Tenn. (5 Pick.), 142, 14 S. W., 484.

Beyond question it would not be in accord with settled law, or with sound policy, to concede, or leave

Gilbert v. Ashby.

grounds for inference, that a wife by failure to discharge her marital duties can extort a conveyance of her husband's property, and lawfully claim it as against her husband's creditors. However, under the special facts of the present case, we believe the wife's demand was made in good faith, and was reasonable. In addition to what has already been said on this subject, it must be noted that the husband's mother was, so to speak, a stranger in the family, one to whom the wife owed no duty in her capacity as such, and one whose presence added new and onerous duties to those incumbent on her as a wife. And, while it is true that many women perform without compensation, and without complaint, and with a compassion worthy of reverence, the duty thus imposed by their husbands, it is no more than right that, where the husband is himself receiving special compensation from his relative, and he devolves the whole care of her upon his wife, the latter should be permitted to enjoy such special compensation as her separate estate.

There were other points made in the briefs, all of which have been considered, but we think those which we have stated are sufficient to support the conclusions we have reached.

The result is that the decree of the court of civil appeals is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION

JACKSON, APRIL TERM, 1915.

STATE *ex rel.* ESTES, Dist. Atty.-Gen. *v.* GOODMAN, *et al.**

(Jackson. April Term, 1915.)

1. WILLS. Probate. Probate in common form.

A chancery court has jurisdiction to set aside the probate of a will in common form, where procured through fraud. (*Post*, pp. 379-381.)

Case cited and distinguished: *State v. Lancaster*, 119 Tenn., 638.

Codes cited and construed: Code 1857-58, ch. 6, secs. 2138-2144; secs. 3825-3837, ch. 6 (S.).

2. WILLS. Will contest. Evidence.

In a proceeding where the validity of a will was in issue, evidence *held* to show that the will was not procured through fraud. (*Post*, pp. 381-402.)

3. WILLS. Validity. Personal property.

To be a valid disposition of personal property, a will need not be attested as required by Shannon's Code, sec. 3895, declaring that no will shall be sufficient to convey an interest in lands unless signed by the testator and subscribed by two disinterested witnesses. (*Post*, pp. 402-404.)

*As to what constitutes capacity or incapacity see notes in 27 L. R. A. (N. S.), 2, L. R. A., 1915A, 443.

State ex rel. v. Goodman.

4. WILLS. Validity. Personal property.

While the execution of a will must be proven by two witnesses, or it is not sufficient to pass title to personal property, it is not necessary that such witnesses be subscribing or attesting witnesses. (*Post*, pp. 402-404.)

Cases cited and approved: *Suggett v. Kitchell*, 14 Tenn., 425; *Moore v. Steele*, 29 Tenn., 563; *Jones v. Arterburn*, 30 Tenn., 97; *Davis v. Baugh*, 33 Tenn., 478; *Johnson v. Fry*, 41 Tenn., 101; *Morris et al. v. Swaney et al.*, 54 Tenn., 591; *Franklin v. Franklin*, 90 Tenn., 44; *Reagan v. Stanley*, 79 Tenn., 316-325.

Code cited and construed: Sec. 3895 (S.).

5. WILLS. Validity. Personal property.

A legatee of personal property is not incompetent by reason of his interest, to prove the execution of the will; his interest going only to his credibility. (*Post*, pp. 404, 405.)

Cases cited and approved: *Moore v. Steele*, 29 Tenn., 563; *Johnson v. Fry*, 41 Tenn., 101; *Franklin v. Franklin*, 90 Tenn., 44; *Beadles v. Alexander*, 68 Tenn., 644; *Orgain v. Irvine*, 100 Tenn., 194.

6. WILLS. Review. Presumptions.

Where the probate court admitted to probate in common form a will of personality, there is a presumption, in the absence of evidence to the contrary, that there was sufficient evidence to warrant its probate, and that presumption is not overthrown by a showing that some of the witnesses in favor of the will did not see its execution. (*Post*, p. 406.)

7. WILLS. Validity. Evidence.

In a proceeding where the validity of a will was involved, evidence held to warrant a finding that the testator had sufficient mental capacity. (*Post*, pp. 406-411.)

8. WILLS. Validity. Condition of testator.

The bodily infirmities of a testator will not render his will invalid. (*Post*, pp. 406-411.)

Cases cited and distinguished: *Smith v. Harrison*, 49 Tenn., 230-247; *Nailing v. Nailing*, 34 Tenn., 630.

State ex rel. v. Goodman.

9. WILLS. Validity. Testamentary capacity.

That a testator who dictated his will while in his last illness made grammatical errors, and may have used expressions which were not applicable to his estate, does not show his want of mental capacity. (*Post*, p. 411.)

10. WILLS. Construction. Bequest.

The intent of the testator will be given effect, and, where he referred to one of the beneficiaries by name different from her real name, she is entitled to the bequest; it appearing the testator always addressed her in that name. (*Post*, p. 412.)

Cases cited and approved: *Thompson v. McKisick*, 22 Tenn., 631; *Lynch v. Burts*, 48 Tenn., 600; *Williams v. Williams*, 18 Tenn., 20; *Seay v. Young*, 39 Tenn., 418; *Massie v. Jordan*, 69 Tenn., 646; *Jobe v. Dillard*, 104 Tenn., 658.

11. WILLS. Awarding of costs. Right to.

Where the State claimed property by way of escheat asserting that deceased died intestate without heirs, and persons claiming to be heirs set up their rights adverse to claimants under the will, neither the State nor the rival claimants, the will being sustained were entitled to cost. (*Post*, pp. 412, 413.)

FROM SHELBY.

Appeal from the Chancery Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—F. H. HEISKELL, Chancellor.

CARBOLL, SCOTT & FISHER and Z. N. ESTES, for plaintiffs in error.

WM. H. FITZHUGH, McGEHEE, LIVINGSTON & FARRA-BAUGH, J. W. CANADA, HENRY CRAFT, JACKSON & McREE, JERE HORNE, P. H. PHELAN, JR., and W. A. COLLIER, for defendants in error.

State ex rel. v. Goodman.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

This is a suit by the State of Tennessee on the relation of Z. N. Estes, District Attorney-General, in and for the county of Shelby, under the authority conferred on that officer by chapter 6, Code of 1857-58. See sections 2138-2144, inclusive, of that Code. See, also, Shannon's Code, chapter 6, sections 3825-3837, inclusive. The legislation above referred to applicable to the present suit are those sections dealing with the State's right by such a proceeding to obtain a decree, declaring an escheat to the State for the benefit of the common school fund of "the estate real and personal of any person dying intestate within this State without issue, and leaving no relatives entitled by the law of descent to his estate." Such was the purpose of the original bill in the present proceeding. The estate sought to be escheated was that of E. J. Halley, who departed this life in Shelby county, Tennessee, on the 19th day of October of the year 1910. That this estate consisted wholly of personal property seems to be a fact not in dispute. It was for the most part money deposited in bank to the credit of the testator. The balance of the estate was represented by purchase-money notes for two adjoining lots of land located on the east side of Main street, in Memphis. These lots Halley conveyed to May H. Smith, D. M. Armstrong, Abe Goodman, all of Shelby county, by deed dated March 5, 1910. The consideration expressed in this deed was the sum of \$60,000, of which \$10,000 was cash in hand paid, and

State ex rel. v. Goodman.

the balance was to be paid at the rate of \$5,000 annually for ten years, with interest at four per cent, per annum on the deferred payments. These payments were secured by trust deed on the two lots of land, which were fully described in the deed. At the time this deed was executed, Halley and the purchasers entered into a contract whereby he agreed that he would repurchase the property from them at the same price provided the purchasers exercised the option to resell to him within twelve months from March 18, 1910. At the time of his death such option had not been exercised by the purchasers, but the time within which the right was in them to exercise it had not expired. The parties made defendant to the original bill were the purchasers of said real estate (with the exception of May H. Smith); also the legatees named in a paper writing signed by Halley and purporting to be his last will and testament, which writing had been probated in common form between the date of Halley's death and the filing of the original bill. Abe Goodman was also made a party defendant as administrator with the will annexed, and the unknown heirs of E. J. Halley were named as parties defendant to the bill.

After this bill was filed it was amended and additional defendants were brought in. These were E. K. Keefe *et al.*, who were claiming to be heirs at law of Halley. The parties defendant to the two bills filed by the State may be grouped into two classes: First, those claiming under the probated will; second, those claiming as heirs at law. The State insists that Halley died intestate,

State ex rel. v. Goodman.

without issue, and leaving no relatives entitled by the law of descent to his estate. The legatees under the probate will rely upon it to defeat the claim of the State, and also to defeat any claim set up by the heirs at law. E. K. Keefe *et al.* contend that Halley died intestate, that they are the true heirs at law and entitled to his estate by the law of descent. If the legatees are right, both the State and *Keefe et al.* are wrong. So, it is apparent that the case turns on the single question: Is the will valid? The assault made upon the validity of the will both by the State and *Keefe et al.* is grounded upon fraud in the procurement of the will at a time when, as they allege, Halley lacked mental capacity to make a will. The probate of the will relied on by the legatees was only in common form. The jurisdiction of the chancery court to set aside the probate of the will where that jurisdiction is invoked on the ground of fraud in its procurement is well settled. See *State v. Lancaster*, 119 Tenn. (11 Cates), 638, 105 S. W., 858, also reported in 14 L. R. A. (N. S.), 991, 14 Ann. Cas., 953. In that case the present Chief Justice, speaking for the court, said:

“The rule thus announced is an exception to the general rule that the integrity of a will cannot be questioned unless a contest be first instituted in the county court, and thence carried in the regular way through the circuit court. It appears from the authority just cited that where there is a litigation over specific property, in a case brought for the purpose, and either party claims under a will probated only in common form,

State ex rel. v. Goodman.

and the other interposes as an objection to the will that it was procured by fraud, this question may be made in the case itself," etc.

Upon the issues made by the pleadings a large amount of proof was taken, the record comprising more than 2,200 pages. The legatees under the will were successful both in the chancery court and the court of civil appeals, except that the court of civil appeals taxed all costs against the estate, and the case is before us on petitions for *certiorari* respectively filed by the State and E. K. Keefe *et al.*, and on a petition filed by the legatees on the question of costs. It is unnecessary to discuss in detail the assignments of error. We will consider only the controlling questions which they raise.

First, was there fraud in the procurement of the will? Second, was Halley of sound and disposing mind when the will was made? Third, was there fraud in the probate of the will, and if so what was its effect on the rights of the parties to this suit?

The foregoing are the only questions made by the assignments of error which need be discussed. We shall not undertake to answer these questions *seriatim*, but we will dispose of each of them in the course of the opinion. We will not undertake to state the evidence *pro* or *contra* upon any disputed question of fact, but will state the facts which we have concluded are established by a preponderance of the evidence.

The exact value of the estate owned by E. J. Halley at the time the will was made does not appear, but it consisted, as heretofore indicated, of money in bank and

State ex rel. v. Goodman.

purchase-money notes for real estate which he had sold, and the approximate value of this property was \$230,000, or more. This large estate had been accumulated mainly by his mother and himself in the conduct of a grocery and liquor business in the city of Memphis. The mother of Halley was a woman of unusual character. She is thought to have been a native of Ireland. She was married first to John Halley, and of this marriage E. J. Halley was born in the year 1858. His father is said to have died during the Civil War. Her second marriage was to John W. Madden, who died in 1878. Of that marriage there was no issue. She remained Madden's widow until her death, which occurred on February 15, 1910. From 1878 until her death her sole interest in life seems to have been the conduct of her business and the accumulation of money. She kept no bank account, lived in rooms over the storehouse in which the business was conducted, did her own housework, would keep no servant, aided in the selling of goods in the store and in the management of the business. She kept no clerk in the store except Halley. She kept one negro porter and sometimes employed assistance for him. She paid no house rent, would not have a telephone, dressed very plainly, never visited, never went to church, received no social attentions, ruled her business and all the affairs of the house with a rod of iron, and continued during all the years to hoard up money. Her money, as it accumulated, was kept in a room to which no one except herself was admitted. Until her son E. J. Halley was about seventeen years of

State ex rel. v. Goodman.

age he was sent to school. After he was that old he was taken from school, placed in the store, and from that time until his mother's death he seems to have emulated her devoted slavishness to business. He was industrious in his habits, and a very capable business man. He appears, however, to have been given more to friendships than his mother. There was a softer side to him. His friendships were not numerous, but they appear to have been constant and strong. His affection for his mother was very deep, and her death was a blow from which he appears never to have recovered. Until that event, though he was not a total abstainer, he was habitually a sober man, but after that he began to drink to excess and appears to have continued in that course until his own death, which was due, beyond doubt, to the excessive use of alcoholic stimulants. After the death of Halley's mother, when an investigation of her treasure room was made, it was found to contain the sum of \$185,000 in currency and coin. Of this total, \$12,000 was in gold. The mother died intestate, and Halley, as her sole heir at law, took charge of the money and deposited it to his credit in the Commercial Trust & Savings Bank. Of this institution Mr. Goodman, the administrator, with the will annexed, was president, and D. M. Armstrong was cashier. Soon after this deposit was made Halley sold out his merchandise business, and sold his real estate, as we have already mentioned. After this he concluded to travel. He secured as a traveling

State ex rel. v. Goodman.

companion a Mr. Harper. They first visited different portions of the United States, then made a trip to Bermuda, and then to Europe.. They left Memphis in April, 1910, and returned in August, 1910. Halley paid all the expenses, amounting to some \$6,000. Soon after his return to Memphis he engaged rooms at the Monarch apartment house kept by Mrs. Frank Trimble. There illness overtook him, caused by excessive drink. After he had been there for two or three weeks, his doctor concluded that it was best to take him to the Gartley & Ramsey Hospital. This was done, and at the hospital Halley made his will and died. He arrived there on Monday morning, October 17, 1910. On that Monday night, October 17, 1910, between six and nine o'clock, he made his will, and he died on Wednesday morning, October 19th, at about a quarter to one o'clock.

The will made by Halley was as follows:

“Memphis, Tenn., Oct. 17—10.

“I, E. J. Halley, of a sound mind will make this my last will and testament. I bequeath to the following people mound set of the names, E. O. Kolley \$500, Mr. R. G. Ramsey, \$500, Miss Elizabeth Berry, \$500. I give A. Goodman and Armstrong \$10,000 a piece, Ed. Hurlburt \$5,000, Jack Brennan \$5,000, George Becktall \$20,000, Mrs. Moseley \$20,000, Mrs. Moseley's housekeeper \$20,000, W. M. Palmer \$20,000.

F. J. HALL.

State ex rel. v. Goodman.

“Mrs. Mergle, Sr. \$20,000, Ed Mergle \$20,000, Thrador Mergle \$10,000, the balance of my real estate I give to the St. Peter’s Orphan Asylum.

“E. J. HALLEY.

“Witness: E. O. KOLLEY.

“R. G. RAMSEY.

“E. BERRY.

“M. A. PARROTT.

“N. GARTLEY.”

The facts surrounding and shedding light upon the execution of this will are ably summed up in the opinion of the court of civil appeals delivered by Mr. Justice Hall, from which we copy as follows:

“This last will was written by Kolley at Halley’s dictation on the stationery of the sanitarium. The stationary consisted of a tablet, the sheets of paper being stuck or glued together at the top or head of the tablet. The will was written on two sheets, and tearing these sheets loose from the remainder of the tablet they became separated. The evidence shows that Halley signed the last sheet first, after which he requested Kolley to hand him the first sheet, and he signed that also, but in signing it the original will itself shows that he ran off the paper, which rested on a chart rack. This is also shown by other evidence in the record. Before dictating the will to Kolley, Halley had requested his nurse to send for Mr. W. H. Fitzhugh, his lawyer, telling him that he believed his time was short and he wanted to make his will. Mr. Fitzhugh was called for

State ex rel. v. Goodman.

over the telephone, but it was ascertained that he was out of the city and could not be gotten. Halley was informed of this fact. Thereupon it is shown by the testimony of Kolley and others that Halley requested Kolley to get some paper and a pen and ink and he would dictate his will himself. This was done. However, the will was written with an indelible pencil, a pen and ink not being convenient.

“It is shown by the testimony of Kolley, Dr. Ramsey (one of the managers of the sanitarium), Miss Elizabeth Berry, Miss Smith, and a Mr. Phelan that Halley dictated every word of the will from first to last, and even spelled some of the names of the legatees mentioned in the will for Kolley, the draftsman. After the will was written, it was witnessed by Kolley, R. G. Ramsey, and Miss Elizabeth Berry, all beneficiaries under the will, at the request of the testator. After the same had been witnessed the testator told Kolley to put the will away where it would be safe. Kolley says that he put the will on a shelf in the sterilizing room, which was usually kept locked, until the next morning, when he took the will and put it in his pocket. Halley died on Wednesday morning, October 19th, at twelve-forty o'clock; the immediate cause of his death being heart failure. Some time during the morning of Halley's death, and after he died, Kolley turned the will over to Dr. Ramsey, and it was subsequently placed in a box in the safety vault of the Commercial Trust & Savings Bank by Drs. Ramsey and Gartley, and was probated in the probate court of Shelby county some

State ex rel. v. Goodman.

days later. A. Goodman, one of the beneficiaries in the will, qualified as administrator with the will annexed.

“The principal witness relied on by the State and cross-complainants, and whose testimony they insist establishes Halley’s incompetency to make the will at the time stated, is Dr. A. B. Williams, Halley’s attending physician. Dr. Williams testified that he had been attending Halley for some two or three weeks prior to his going to the sanitarium for treatment. He says that Halley was suffering from the excessive use of alcoholic liquors and was extremely nervous, and at times was hysterical before being sent to the sanitarium. He says that he saw Halley on Sunday before he was carried to the sanitarium on Monday morning. He says Halley was rational at that time and was cursing some of his pretended friends whom he claimed had been responsible for his excessive drinking and frequent debauches; that he was also denouncing the Catholic Church for refusing to bury his mother, his mother being a Catholic at the time of her death, but the evidence tends to show never in any way supported the church either by attendance or financially. Dr. Williams says that he talked to Halley and told him that he was wrong in his views and feelings toward the Catholic Church. He says he said to Halley on that occasion: ‘You are a Catholic and I am a Protestant, but that is not right or just. You are an Elk, are you not?’ He said: ‘I am.’ I said: ‘Well, if you did not attend your Elk’s Lodge, and did not pay your dues, would you expect the Elks to have anything to do with you in

State ex rel. v. Goodman.

the event of your death?' He said: 'No.' I then suggested that in the event of his death, as I thought of him somewhat as an orphan, that is, not having a living father, he would have some fellow feeling for orphans, and I suggested that he leave a portion of his estate to St. Peter's Orphan Asylum. He said: 'Williams, you are a better man than I thought you were. I will do that.' That was Sunday. Monday morning I took him to the sanitarium. Dr. Williams says that Halley had frequently told him that he had no relatives or kindred. The next morning after the conversation detailed above by Dr. Williams he carried Halley to the sanitarium between nine and ten o'clock. He says that he saw Halley again that afternoon about six o'clock or six-thirty at the sanitarium. He was in the treatment room and was being given a massage treatment by Dr. Ramsey. He says Halley was then having hallucinations and imagined that some person was behind the curtain trying to shoot him. He says that Halley was suffering from delirium tremens at the time of being carried to the sanitarium. He says he next saw Halley on Tuesday shortly before noon; that Halley was sitting propped up in the bed, had a newspaper in his hand and pretended to be reading, but says that Halley was unable to read, because he was not able to concentrate his thoughts, though he did not test him to see. Kolley, the nurse, says that Halley read for an hour on Tuesday, and besides reading the newspaper, called for a magazine and read that. The occasion of Dr. Williams'

State ex rel. v. Goodman.

second visit to Halley at the sanitarium was the next day after the will was written. He says that Kolley showed him the will immediately upon entering Halley's room, and said to him, 'Here is a will Mr. Halley made last night,' and told him (Williams) that this will was one of several that Halley had made during the night. Kolley, however, emphatically denies that he told Dr. Williams that Halley had made any other will than the one shown him. Dr. Williams says that he took the will and looked at it and asked Halley if he signed the will, and that Halley replied, 'Yes.' Dr. Williams gives it as his opinion that Halley was not mentally capacitated to make a will or transact any character of business when he saw him Monday afternoon and Tuesday morning. It is undisputed that he signed a check for \$100 on Tuesday morning on the Commercial Trust & Savings Bank, payable to his own order, and while the evidence tends to show that he was very nervous from the effects of his long dissipation, his signature to this check is very plain and legible, as is his signature to the original will, which was exhibited in the argument of the case at the last term of this court.

"In our opinion the will is a most natural one. Halley had often been heard by his friends to say that he had no 'kith or kin.' The evidence shows that, excepting the three small legacies given to his two nurses and Dr. Ramsey, one of the managers of the sanitarium, he bequeathed his large estate to his most intimate friends and to a charitable institution. There can be no doubt

State ex rel. v. Goodman.

that Halley dictated the will, because it is shown that none of those present when the will was written knew any of the beneficiaries outside of those connected with the hospital, except the St. Peter's Orphan Asylum, and one of the witnesses says that he had heard of Ed Hurlburt as a baseball player, but did not know him personally. None of the legatees, outside of those connected with the hospital, saw Halley between the date he was carried to the hospital and his death.

“A. Goodman and D. M. Armstrong, to whom he bequeathed \$10,000 ‘a piece,’ were his personal friends, bankers, and financial advisers. Mr. Armstrong had, some time previous to the making of the will, rendered Halley very valuable service in preventing his large estate from being back assessed for State and county taxes. In fact, the record shows that Mr. Armstrong was cited, as an officer of the bank in which Halley had his money deposited, by the trustee of Shelby county to appear and give evidence before him on a citation or proceeding to back assess the estate which he had inherited from his mother. Mr. Armstrong refused to testify to the extent of Halley's estate, was sentenced to jail by the trustee for not answering questions put him concerning the estate, and was afterwards released on a writ of *habeas corpus* granted by Judge Galloway of the probate court. Subsequently, Halley effected a compromise with the revenue agent by paying taxes to the amount of \$5,000, which compromise resulted in a saving to Halley of several thousand dollars.

State ex rel. v. Goodman.

“Ed Hurlburt, to whom \$5,000 was given under the will, is shown to have been one of Halley's associates and personal friends of several years' standing. They often took automobile drives together, and Hurlburt acted as one of the pallbearers at his mother's funeral at the request of Halley.

“Jack Brennan, to whom \$5,000 was given, was also a personal friend of Halley's, and had been such for some ten or fifteen years before Halley's death. Their relations were very intimate. Halley visited Brennan at his room every Sunday night for a number of years prior to his mother's death.

“George Beckett was another personal friend of Halley's. He was a flour and molasses drummer and drummed the city trade. He called on Halley and his mother every week. He would often attend to business transactions for Halley when not otherwise engaged. When Halley left on his trip around the world, he left his mother's grave in Beckett's care, and Beckett would go out and place flowers on it every Sunday during Halley's absence. Beckett also acted as pallbearer for the remains of Halley's mother at Halley's request. Halley and Beckett had been the warmest of friends for years before the former's death.

“The Mrs. Moseley mentioned in the will, and to whom \$20,000 was given, is shown to be in fact Mrs. Frank Trimble, the woman at whose apartment house Halley was rooming at the time he was carried to the sanitarium. The evidence shows that Halley had been

State ex rel. v. Goodman.

acquainted with Mrs. Trimble and her husband for a number of years prior to his death.

“He always called Trimble ‘Moseley,’ and Mrs. Trimble ‘Mrs. Moseley.’ The proof shows that Trimble solicited for the Moseley Cigar Company, and often called on Halley and his mother to sell them cigars. Mrs. Trimble traded to a considerable extent with Halley’s mother, purchasing goods for her apartment house. Halley always addressed her as Mrs. ‘Moseley,’ and spoke of her as ‘Mrs. Moseley’ to his friends. He would often speak of what a fine woman she was. The fact that Halley always called Mrs. Trimble, when speaking to or of her, ‘Mrs. Moseley,’ is shown beyond a reasonable doubt. A number of witnesses testify to this. Dr. Williams testified that Halley always spoke of Mrs. Trimble as ‘Mrs. Moseley.’ The proof shows that Mrs. Trimble was exceedingly kind to Halley while living in her apartment house, and especially was this true when Halley would be ill or on a ‘spree.’ She would often bring him sweet milk and frozen ices from her home, and showed him many kindnesses. The evidence tends to show that Halley was a very grateful man for any kindness shown him, and thought a great deal of Mrs. Trimble.

“The will gives to ‘Mrs. Moseley’s housekeeper’ \$20,000. It is shown that Mrs. Trimble had a housekeeper whose name was Mrs. Anna Lang. This lady superintended the housekeeping at the apartment house where Halley roomed. She was also exceedingly kind to Halley. She would often wait on Halley during

State ex rel. v. Goodman.

the time he was sick at the apartment, would fix him things to eat, would sponge his face and body, get medicine for him, and showed him many other acts of kindness. Mrs. Lang had a grown daughter living with her in the apartments. She and her daughter would often go into Halley's room while he was ill and wait on him as though he had been a member of the family. He always addressed Mrs. Lang as 'housekeeper,' and spoke of her as 'Mrs. Moseley's housekeeper,' when speaking of her to others. Sometimes he would address her as 'my good woman.' He was never heard to call her by her name. He would always address her daughter as 'the little one.' Halley had no nurse while at the apartments, and Mrs. Lang and Mrs. Trimble showed every attention they could. They both say that Halley was rational on Monday morning when he left the apartments to go to the hospital; that he told them good-bye, saying that he would be back in a few days if he did not die. He was carried to the hospital by Dr. Williams in an automobile. It is further shown that on the Monday morning that Halley was carried to the hospital he sent for a barber and had the barber to shave him in his room. It is shown that Halley dressed himself on that morning and walked down the stairway to the street to take the automobile without assistance other than Dr. Williams taking hold of his arm.

"W. M. Palmer, to whom \$20,000 is given by the will, was another of Halley's personal friends. He acted as one of the pallbearers at Halley's mother's funeral. He was one of the two friends that Halley invited to as-

State ex rel. v. Goodman.

sist him in counting money left him by his mother before it was removed from her apartments and assisted Halley in carrying it to the bank. Palmer is a deputy sheriff of Shelby county, and also ran a boarding house near where Halley and his mother did business. He traded with Halley and his mother. They were warm personal friends for a number of years before Halley's death.

"The Mergles, to whom large bequests are given by the will, were also warm personal friends of Halley for many years prior to his death, and at one time, many years before Halley's death, the Mergles and Halley family lived in the same house. Halley was especially intimate with Ed Mergle, and while away on his European trip he would write him post cards, addressing him as 'Dear Boy,' etc., and would ask Ed Mergle to remember him to his 'dear mother.' The evidence shows that Mrs. Mergle, Sr., was the only woman who visited his mother during her illness. The evidence shows that Halley was more intimate with Ed Mergle than he was with Theodore Mergle, whose name is spelled in the will 'Thador,' and this probably accounts for his giving Ed Mergle \$20,000 and Theodore only \$10,000. He also wrote letters to Hurlburt, Brennan, and Beckettall while away on his European trip. These letters show that Halley entertained the warmest feeling for these men.

"The St. Peter's Orphan Asylum mentioned in the will is the same institution discussed with Halley by Dr. Williams on the day before Halley was carried to the

State ex rel. v. Goodman.

sanitarium. The proof shows that Halley was a man who had very few associates, and those mentioned in the will were his most intimate, except the man Harper, whom he carried with him on his trip around the world. The evidence shows that Halley and Harper had a falling out on that trip, or soon after their return to Memphis, and on the day before Halley was carried to the sanitarium he was denouncing Harper as being one of the men responsible for his condition. He did not leave Harper anything under his will.

“We are of the opinion that the will which Halley made was just the character of will that most men do and would make situated as he was. He believed that he was without relatives to leave his property to. This is shown beyond any sort of question. The will shows a strong sense of proportion, and, we think, shows that Halley was possessed of his reasoning powers at the time he made it. He bequeathed to his nurses and one of the managers of the hospital small bequests. He had only known them for one day. They had been kind to him, no doubt. He was disposing of a large estate and he wanted to leave them a small sum for the kindnesses shown him. In fact, he so stated at the time he made the will. It will be noticed that the will gives to ‘A. Goodman and Armstrong \$10.000 a piece.’ He used the names of Goodman and Armstrong in the same connection, or together, but he used the words ‘a piece,’ showing that he wanted them to each have \$10,000. In making the bequest to Mrs. Mergle he used the name ‘Mrs. Mergle, Sr.,’ showing that he knew that there was

State ex rel. v. Goodman.

another Mrs. Mergle in the Mergle family, and that he did not have reference to the wife of Ed Mergle. He gave the largest legacy to the St. Peter's Orphan Asylum, which the proof shows is a Catholic institution, but is nonsectarian in the taking in of orphan children. Halley evidently had in mind the conversation he had had with Dr. Williams on the day before, when he told Dr. Williams that he would do something for that institution in the event of his death. We think the will itself is a most powerful witness in favor of Halley's mentality. As before stated, the draftsman of the will, nor those who witnessed it, were not acquainted with the legatees mentioned therein, outside of those connected with the sanitarium and had never heard of any of them except Hurlburt and the St. Peter's Orphan Asylum. While the proof tends to show that, perhaps, Drs. Ramsey and Gartley knew that Halley was a man of means, Dr. Williams says he told them this when he carried Halley to the hospital, none of those present at the time the will was made knew the extent of Halley's estate. There is absolutely no evidence in the record tending to show that any one connected with the hospital practiced any fraud on Halley to procure the will. Kolley and the other witnesses present at the writing of the will say that Halley appeared to be rational and knew what he was doing.

“Mr. Phelan, a patient at the hospital, says that he heard Halley dictating the will, and says that he appeared to be rational at the time and understood what he was doing.

State ex rel. v. Goodman.

“Miss Smith, Mr. Phelan’s nurse, who was in no way connected with the hospital, but had gone to the hospital to nurse Mr. Phelan after an operation, says she was standing in the hall near the door of Halley’s room while the will was being dictated. She says she heard Halley dictate the will; that he appeared rational and seemed to understand what he was doing. Miss Smith also contradicts Dr. Williams in his testimony as to Halley’s mental condition at six o’clock on Monday night, the night the will was made. She says that she was downstairs in the hall when Dr. Williams was leaving the sanitarium, after he had seen Halley, and some one asked Dr. Williams in her presence how Mr. Halley was getting along, and that Dr. Williams replied that ‘he would be out in a few days;’ that Dr. Williams stated that he had just had a long talk with Halley and told him how he ought to do and live when he got well. Both of these witnesses were introduced by contestants.

“The proof also shows that Dr. Williams called to see Ed Mergle and Mrs. Trimble the same day of Halley’s death or the day thereafter, told them of the legacies that had been left them by Halley’s will, and congratulated them on their good fortune. They both testify that Dr. Williams told them that Halley was certainly rational when he made the will, because he was rational each time he saw him at the hospital. To Mrs. Trimble he lamented over the fact that Halley had not left him anything in the will. Ed. Mergle also says that he expressed surprise and disappointment to him

State ex rel. v. Goodman.

that Halley did not remember him in his will. They both say that Dr. Williams told them he was going to put in a 'stiff' bill against the estate, and would even up that way. The proof does show that he did subsequently threaten to put in a claim against the estate for \$1,500 for medical services, and that he did finally sue the administrator of Halley for a claim of \$1,000. This claim was paid after suit was brought, and Dr. Williams subsequently insisted on the administrator paying his counsel fees incurred in that suit, claiming that Mr. Fitzhugh, who acted as counsel for the administrator, had agreed to pay his fees. The agreement was denied by Mr. Fitzhugh.

"Mrs. Trimble says, and she impresses this member of the court as being a very candid and truthful witness, that on one occasion after Halley's death she met Dr. Williams on the street, and Dr. Williams asked her to go to a picture show with him, saying that he wanted to talk with her; and that while in the picture show Dr. Williams talked with her about Halley's will, and asked her if she would not go to Ed Mergle and request the Mergles to sign an agreement to each give him \$1,000 of what they would receive under the will, again expressing surprise that Halley did not remember him in the will. Mrs. Trimble says that she told Dr. Williams that she could not do it, but subsequently, in giving an order for meat over the telephone, mentioned the matter to Mr. Mergle. She says that Mergle refused to entertain any such proposition, and said he was not 'bribing anybody.' Mrs. Trimble says

State ex rel. v. Goodman.

that about a week after this conversation she again met Dr. Williams on the street, and he asked her if she had ever mentioned the matter to Mergle, and she told him what Mergle said, to which he replied: 'Well, they had all better look out. I am the key to the whole thing.' She says that she had no conversation with Dr. Williams with reference to Halley's will after that time.

"Dr. Williams admits the conversation with Mrs. Trimble in the picture show, but says that Mrs. Trimble made the proposition to him that she would see the Mergles and get them to agree to give him \$1,000 each, in view of the fact that he had not been left anything by the will and was an important witness in the case. Dr. Williams does not claim that he repudiated or in any way scoffed or resented Mrs. Trimble's proposition.

"Mr. W. H. Fitzhugh testified that some time after Halley's death Dr. Williams had a conversation with him in his office about Halley's will, and gave it as his opinion that Halley was of sound mind at the time he made the will. This was before any controversy arose over Dr. Williams' medical bill. Mr. Fitzhugh says that Dr. Williams told him in that conversation that Halley was rational on the occasion of his two visits to the hospital to see him. He says that Dr. Williams told him that Halley had lucid intervals, and seemed greatly improved when he was at the hospital on Tuesday, at which time he told Mr. Fitzhugh, Halley was sitting up reading a newspaper. Mr. Fitzhugh further testified

State ex rel. v. Goodman.

that some two or three weeks after this conversation Dr. Williams came to his office again and, after making some reference to the will and his testimony in the case, told Mr. Fitzhugh that he could be of assistance to him in getting some money from Mrs. Lang, one of the beneficiaries named in the will, to which Mr. Fitzhugh says he replied that he would have nothing to do with such a matter. Dr. Williams denies these conversations with Fitzhugh.

“Ed Hurlburt testified that Dr. Williams, after the death of Halley, was in his office many times; that he had several conversations with him with reference to the will; that frequently Williams would come to his place, and the two would go to a saloon and drink together. He says Dr. Williams often parked his automobile in front of his business place. He says in the conversation with Dr. Williams about the will that he gave it as his opinion that Halley was in his right mind when he made the will. He says that Dr. Williams suggested to him on several occasions that he (Hurlburt) should go and see the other legatees and see what they would do for him, saying that ‘we ought to get together and do something for him, as his testimony would go a long ways in deciding the case.’

“Dr. Williams denies any such conversation with Hurlburt. He says Hurlburt on the day after Halley’s death offered him \$1,000 of the \$5,000 legacy left him under the will. Hurlburt denies that he ever offered him this or any other sum. The proof shows that there was no litigation about the will at that time.

State ex rel. v. Goodman.

“Palmer says that he asked Dr. Williams on one occasion as to his opinion of Halley’s mental condition at the time of making the will, and that Williams replied, ‘That is for me to know and for you to find out.’ Dr. Williams admits that he made this statement to Palmer in answer to his question.

“George Beckettall says that upon one occasion he asked Dr. Williams as to the mental condition of Halley at the time he made the will, and says that Dr. Williams told him that he was not committing himself on that question; that the legatees had not been around ‘to see him yet.’ Beckettall says that Dr. Williams told him further that if the legatees could get along without him he could get along without the legatees. Dr. Williams admits that Beckettall did ask him on more than one occasion for his opinion as to Halley’s mental condition at the time he made the will, and that he refused to tell him. He denies, however, the statement attributed to him by Beckettall.

“Dr. Williams denies that he ever told anybody any material fact as to Halley’s condition at the hospital, or stated to any one his opinion as to Halley’s mental condition until he was put on the witness stand for the taking of his deposition by counsel for the State and cross-complainants. He denies that he even informed counsel for complainant and cross-complainants as to what he thought of Halley’s mental condition before he was examined as a witness. He says he had refused to tell anybody his opinion of Halley’s mental condition at

State ex rel. v. Goodman.

the time he made the will. He was asked on cross-examination why he refused to tell any one what he knew about Halley's mental condition prior to being examined as a witness, and answered by saying that he was not committing himself on that question. In one place he says he did not want 'to give his hand away.' It is hardly believable that counsel for complainant and cross-complainants would have examined Dr. Williams as a witness in behalf of their clients without first knowing his opinion as to Halley's mental condition. Dr. Williams stands impeached by a number of witnesses in the record, and we cannot give any great weight to his testimony, notwithstanding he introduces several witnesses who testify that he is a man of good character."

Under the facts, as above stated, on what ground may petitioners find a firm footing to maintain their proposition that the will was procured by fraud? The petitioners do not base their assault on the ground that the will was not so attested as to make it sufficient to convey real estate. Indeed, they say testator owned no real estate when the will was made, and from this standpoint they make the argument that his use of the words "real estate" in the residuary clause of the will is evidence of unsoundness of mind. It results that the will must be tested upon its sufficiency in law to pass title to personal property. To accomplish such purpose, it was not necessary that the will should be attested by two witnesses neither of whom was interested in the legacies made by the will. In other words, a will

may be sufficient to pass title to personal property without being attested in the manner required by section 3895 of Shannon's Code. That section applies to wills which convey the title to real estate. Indeed, it is not necessary that there be any subscribing witness or witnesses upon a will in order that it suffice to pass the title to personal property, but nevertheless the *factum* or execution of a will in order that it shall pass the title to personal property must be proven. The rule of the civil law later adopted by the ecclesiastical courts of England that a will of personal estate was required to be proved by two witnesses was announced as the rule in this State, by one of our early cases. *Suggett v. Kitchell*, 14 Tenn. (6 Yerg.), 425. See, also, *Moore v. Steele*, 29 Tenn. (10 Humph.), 563; *Jones v. Arterburn*, 30 Tenn. (11 Humph.), 97; *Davis v. Baugh*, 33 Tenn. (1 Sneed), 478; *Johnson v. Fry*, 41 Tenn. (1 Cold.), 101; *Morris et al. v. Swaney et al.*, 54 Tenn. (7 Heisk.), 591; *Franklin v. Franklin*, 90 Tenn. (6 Pick.), 44, 16 S. W., 557. It has also been held that while "the law has wisely required that at least two shall be necessary, not witnesses who have attested the writing, but such as may expressly, or by circumstances, establish the *factum*, two are not required to each particular fact, or to everything necessary for a complete testament. One may prove the making, or contents, and the other, some previous declarations, subsequent recognitions, or other extrinsic circumstances, tending to corroborate the act itself." *Johnson v. Fry*, 41 Tenn. (1 Cold.), 101.

State ex rel. v. Goodman.

The rule set out in the quotation last above was approved in *Morris et al. v. Swaney et al.*, 54 Tenn. (7 Heisk.), 591-595. See, also, *Reagan v. Stanley*, 79 Tenn. (11 Lea), 316-325.

It is not necessary that both or either of the witnesses who prove the *factum* or execution of a will of personalty should be subscribing witnesses, or, as they are otherwise called, attesting witnesses. *Moore v. Steele*, 29 Tenn. (10 Humph.), 563; *Johnson v. Fry*, 41 Tenn. (1 Cold.), 101; *Franklin v. Franklin*, 90 Tenn. (6 Pick.), 43, 16 S. W., 557. A legatee under a will of personal property is not rendered incompetent by his interest to testify as a witness to prove the *factum* or execution of the will. His interest only goes to the credibility of his evidence, and not to his competency as a witness. *Franklin v. Franklin*, 90 Tenn. (6 Pick.), 44, 16 S. W., 557; *Beadles v. Alexander*, 68 Tenn. (9 Baxt.), 644; *Orgain v. Irvine*, 100 Tenn. (16 Pick.), 194, 43 S. W., 768. From what has been said it is clear that the evidence of the three legatees, Kolley, Ramsey, and Elizabeth Berry, would have been competent to prove the *factum* or execution of the will, and had their evidence been introduced in the probate court it would have supported a judgment admitting the will to probate. But it is said that neither of these witnesses testified on the probate of the will, and such is the fact; but does it necessarily result that the probate of the will was fraudulent? One of the witnesses who did testify on the probate of the will was Miss Marjorie Agnes Parrott. She testifies that

State ex rel. v. Goodman.

she signed the will as a witness after the death of Halley, at the request of Dr. Gartley. She was asked whether or not she saw Halley sign the will, and replied, "I could not say whether I saw him sign it or not." What her evidence was on this point before the probate court does not appear. She was asked why she signed the will as a witness if she did not see Halley sign it, and she answered: "Because I was in and out of the room, and was not sure whether I saw him sign it or not." Respecting her evidence in the probate court she was asked this question, "You told the judge what you knew about it?" She answered, "There were one or two questions asked me, and I don't remember just what." She does not state what she testified to on that occasion. Another witness who testified when the will was admitted to probate was Norman Gartley. He signed the will after Halley's death. He said in his evidence that it was possible that he saw Halley sign the will, but he did not remember seeing him sign it. He said he was in and out of Halley's room while Halley dictated and Kolley was writing the will, and thought that justified him in signing his name to it as a witness; that if he had not heard part of it, and had not known anything about it he would not have signed it as a witness. It does not appear what his evidence was before the probate court. These two witnesses were asked to sign the will because the attorney for the hospital, who was consulted by Dr. Ramsey, was under the impression that the three legatees who signed the will were incompetent as witnesses to prove its execution.

State ex rel. v. Goodman.

We must assume, in the absence of evidence to the contrary, that the *quantum* of evidence before the probate court, when the will was admitted to probate, was sufficient to support the judgment of that court. That judgment was rendered within a few days after the will was executed, when the facts and circumstances connected with it were fresh in the minds of the witnesses, and for aught that appears to the contrary it may be that the evidence of persons familiar with the handwriting of the testator was introduced on the probate of the will, and by that evidence his signature as it appeared on the will may have been proven to be genuine. At all events, it is clear that every presumption must be indulged in favor of the validity of the judgment of the probate court, and the evidence in this cause is wholly insufficient to overthrow the presumption that the judgment of the probate court was based on the *quantum* of proof required by law to establish the *factum* of the will. But it is said the testator was not of sound mind and disposing memory when the will was made, and therefore its procurement was in fraud of the rights of the State, if there are no heirs at law, or was in fraud of the rights of the latter if they exist. The predicate for this insistence is the evidence of Dr. Williams.

We are strongly inclined to the view that Halley had been subjected to no delusions or hallucinations until some hours after the execution of the will, but on the same night it was made. However, if these symptoms had been exhibited by him prior to the time of the ex-

State ex rel. v. Goodman

ecution of the will, we think it is manifest from the will itself that it was executed during a lucid interval.

Medical experts were at variance in their opinions as to whether or not a patient could have a lucid interval between the delusions and hallucinations of delirium tremens. The experts introduced by the legatees held the affirmative of this proposition, and those introduced by the other side took the negative view. The argument in favor of the affirmative is that delirium tremens, correctly speaking, is not a disease, but is a mere symptom, or a series of symptoms; that its delusions, hallucinations, and tremors, are mere evidences of certain toxic poisons which have found their way to the brain cells and acting thereon as irritants produce the symptoms. Elimination of the toxins by natural processes, or the use of medicines, is said to result in a disappearance of the symptoms, and a normal act or product of the brain occurring during a period of time intervening between symptoms is said to indicate a cessation for the time of the toxic irritation of the brain cells, and a resumption by those cells of their normal activity. It is said that the best evidence of the normal condition of the cells is their product, as indicated by the normal or abnormal character of the acts of the patient. The effect of the toxin on the cells of the brain may be of a character so violent as to destroy the organic matter of the cells, whereupon they cease to function permanently, and there is total or partial insanity according to the extent of the permanent lesion or destruction of the brain cells. The strongest evi-

State ex rel. v. Goodman

dence that no permanent lesion has resulted to the cells of the brain, as the effect of an antecedent toxic poison, is made manifest by rational normal action of the patient when the symptom or symptoms of the existence of the poison have disappeared, and such a period of rational action occurring between antecedent and subsequent symptoms is called a lucid interval. It is said that a brain which produces a normal act manifestly is not in an abnormal condition. A lucid interval is a mere resumption by the brain cells of their natural and normal functions after an antecedent and prior to a subsequent manifestation by symptoms of interferences with the normal functions of the brain cells.

The view entertained by the experts holding the affirmative of the foregoing proposition appears to be entirely reasonable. At all events, we are satisfied that Halley was of sound and disposing mind, within the meaning of the law, when he made the will here in question.

All of the witnesses who were present when the will was made agree in the statement that Halley was very nervous, but all of them likewise agree that he dictated every word in the will; that his dictation was continuous, although his utterance was somewhat indistinct. None of the witnesses could have produced the will which Halley dictated. None of them knew the amount of his estate. None of them knew the legatees provided for in the will (except, of course, the three legatees who were nurses in the hospital.) The smallest legacies in the will are those in favor of these three nurses. None

State ex rel. v. Goodman.

of the legatees (except the nurses) provided for in the will were at the hospital during Halley's illness. Some of them did not even know he was at the hospital. There is no basis in this record for any conclusion other than that the will, as dictated by Halley, was the product of his mind, and the purpose to execute it was his and his alone. He believed his time on earth was short. He said this to the nurses attending him. He expressed his desire to make his will; requested that his lawyer, Mr. Fitzhugh, be called for that purpose. When advised that his lawyer could not be had, he called for pen, ink, and paper; his purpose manifestly being to prepare the will himself. He found himself too nervous to write it. He then requested one of his nurses, Kolley, to write it at his dictation. Now, consider the situation of this testator. He believed himself to be without kindred by blood. His circle of intimate friends was narrow, but there were a few, and they are named in his will. They constitute all of the legatees except the three nurses and the residuary legatee. Now, the legacies in favor of those who were intimate friends of the testator were most natural and normal in character. The testator being, as he believed, bereft of kindred, naturally turned to his most intimate friends in order to find objects for his bounty. The bequests to the nurses in the hospital were normal and reasonable bequests considering the size of the testator's estate, and the fact that these nurses, though not old friends, had, no doubt, been kind and sympathetic in their attendance upon him at the most critical period of his life. The bequest

State ex rel. v. Goodman.

in favor of the residuary legatee was perhaps both a recognition of the testator's religious belief, and an evidence of the existence of a clear and distinct memory of the conversation which had occurred between the testator and Dr. Williams on the Sunday morning before the will was executed. The residuum of his estate went to this legatee. Aside from the conversation had with the testator on Sunday morning before the will was executed, we find in the evidence of Mrs. Trimble the record of conversations between herself and the testator while he was living at her apartment house, in which she had told him of charitable work in which she had been engaged, and he expressed the hope that he might recover from his illness in order that he might be of use to her in that work. In these suggestions there is abundant reason to support the bequest in favor of the residuary legatee as one not only evincing memory of past conversations, past purposes and resolutions on the part of the testator, but also a present purpose and intent to carry out his preconceived plans.

Looking at the will in this way, what other conclusion can be reached than that it was the product of Halley's mind, and his will? We perceive none other. The next conclusion is that, if it was the product of his mind, that his mind must have been sound and his memory of disposing power, because the will as a whole is a normal, sane, natural product. It is immaterial how large the testator's physical or bodily afflictions may have been at the time of the execution of his will if he was possessed of a sound mind and disposing memory.

"The law takes no cognizance of mere physical infirmity as an objection to a will, if the disposing mind is manifest." *Smith v. Harrison*, 49 Tenn. (2 H. 230-247.

" 'A man may freely make his testament how ever he may be, for it is not the integrity of the body but of the mind, that is requisite in testaments.' Swinb., pt. 2, sec. 5. 'The law looks only to the competency of the understanding, and neither age, nor sickness, nor extreme distress, or debility of body will defeat the capacity to make a will, if sufficient intelligence remains.' . . . The will itself contains intrinsic evidence in its favor; it is a reasonable and natural will." *Nailing v. Nailing*, 34 Tenn. (2 Sneed), 630.

We find no merit in the attack made on the testamentary capacity of Halley based upon his use of the words "real estate" in the residuary clause of the will. This may be accounted for upon the ground that it was a mere inadvertence, or upon the ground that he had not in mind his interest in the notes given for the purchase of money of real estate, or upon the ground that the draftsman did not clearly understand what Halley intended to say. We have already referred to the fact that his enunciation at the time he was dictating the will was somewhat indistinct. Nor do we attach any significance to the points made in respect of the technical defects in the will. These may be due to the youth, inexperience, and lack of education of the draftsman.

State ex rel. v. Goodman.

The point that some of the legacies are void for uncertainly, to wit, that in favor of "Mrs. Moseley", and that in favor of "Mrs. Mosley' housekeeper," we think is also without merit. We find no difficulty upon this transcript in reaching the conclusion that the bequest in favor of Mrs. Moseley was intended to operate in favor of Mrs. Trimble, whose initials are set out in the decree of the chancellor, and the bequest in favor of Mrs. Moseley's housekeeper was intended to operate in favor of Mrs. Lang, whose correct initials are also set out in the chancellor's decree.

We believe no rule of law or public policy to be contravened by giving effect to the manifest intention of the testator, and therefore that intention should be allowed to prevail in the present case. Prichard on Wills, secs. 388, 395; *Thompson v. McKisick*, 22 Tenn. (3 Humph.), 631; *Lynch v. Burts*, 48 Tenn. (1 Heisk.), 600; *Williams v. Williams*, 18 Tenn. (10 Yerg.), 20; *Seay v. Young*, 39 Tenn. (2 Head), 418; *Massie v. Jordan*, 69 Tenn. (1 Lea), 646; *Jobe v. Dillard*, 104 Tenn. (20 Pick.), 658, 58 S. W., 324.

Many points have been made, and arguments advanced in voluminous briefs, which we have not discussed in this opinion. We have, however, considered all of the questions which have been made. We have discussed in the opinion only such questions as we thought were of sufficient importance to require it.

In our opinion there is no error in the decree of the court of civil appeals except in the matter of taxation of the costs of the cause. The chancellor decreed that

the cross-bill of E. K. Keefe *et al.* be dismissed at the costs of said parties, and directed issuance of execution for the collection of such costs against them, and the sureties on their cost bonds, S. W. Wilkinson, R. C. Hunt, and W. M. Howard. The chancellor also decreed that the State of Tennessee take nothing by its suit, that the same be dismissed at its costs, and awarded execution for the collection of the same as at law. The court of civil appeals reversed the decree of the chancellor upon the matters of costs, and adjudged that the costs of that court, and of the chancery court should be taxed against the administrator with the will annexed, and that said costs be paid out of funds in his hands belonging to the estate. We think the court of civil appeals was in error, and that the chancellor was correct in adjudication upon this matter of costs.

It results from what has been said that the decree of the court of civil appeals, modified as above indicated, is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
MIDDLE DIVISION

NASHVILLE, DECEMBER TERM, 1915.

GILES COUNTY v. MARSHALL COUNTY.

(Nashville. December Term, 1915.)

1. COUNTIES. Partition. Constitution.

The provision of the Const. art. 10 sec. 4, that where a new county is established by carving territory from old territories, no part of an existing county shall be taken to form a new county without the consent of two-thirds of the qualified voters in such part taken, does not apply, where a portion of one county is, by the legislature, removed and added to an already existing county. (*Post*, pp. 417, 418.)

Acts cited and construed: Acts 1915, ch. 384.

Case cited and approved: *Cocke v. Gooch*, 52 Tenn., 294.

Constitution cited and construed: Art. 10, sec. 4.

2. COUNTIES. Partition. Statutes.

Const. art. 10, sec. 4, providing for removing of territory from existing counties, and formation of new counties, and declaring

Giles County v. Marshall County.

that no line of such county shall approach the courthouse of any old county from which it may be taken nearer than eleven miles, applies where a strip of land is removed from one county and added to another; and Priv. Acts 1915, ch. 384, carving a strip from Giles county and adding it to Marshall county, is invalid, as the line of Marshall county as advanced is nearer than eleven miles of the courthouse of Giles county. (*Post*, pp. 418, 419.)

Cases cited and approved: Gotcher v. Burrows, 28 Tenn., 585; Cheatham county v. Dickson county, 39 S. W. 734; McMillan v. Hannah, 106 Tenn., 689; Union County v. Knox County, 90 Tenn., 541.

3. COUNTIES. Partition. Statutes.

As the court cannot presume on the intent of the legislature (Priv. Acts 1915, ch. 384) which removed from Giles and added to Marshall county a strip of territory, which, in some places, brought the line of Marshall county within eleven miles of Giles county courthouse, the act cannot be sustained by forcing back the line of Marshall county in those places where it came within eleven miles of the county courthouse. (*Post*, pp. 419-422.)

Cases cited and approved: Maury County v. Lewis County, 31 Tenn., 236; Bridgenor v. Rodgers, 41 Tenn., 260.

FROM GILES

Appeal from the Chancery Court of Giles County.—
WALTER S. BEARDEN, Chancellor.

ROBT. C. ARMSTRONG. P. C. SMITHSON and MARSHALL
& MARSHALL, for appellant.

CHILDERS & WOODWARD, for appellee.

Giles County v. Marshall County.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The bill of complaint was filed by Giles county, in its corporate capacity, against Marshall county, seeking to enjoin the defendant county from exercising any jurisdiction over a strip of territory attempted to be taken from the complainant county and added to Marshall county by private Acts 1915, chapter 384. The constitutionality of the act is attacked by the bill of complaint on two grounds set out below.

The chancellor held the act to be invalid, and the county of Marshall has prayed an appeal to this court and assigned errors.

It is manifest that the reason for the passage of the act was to add to the defendant county's area the strip in question so as to bring under that county's taxing power a considerable mileage of a railway recently constructed along the eastern border of Giles county.

The contention of complainant county is that the act is violative of article 10, section 4, of the Constitution of this State, which provides:

“New counties may be established by the legislature to consist of not less than two hundred and seventy-five square miles, and which shall contain a population of seven hundred qualified voters; no line of such county shall approach the courthouse of any old county from which it may be taken nearer than eleven miles, nor shall such old county be reduced to less than five hundred square miles. . . . No part of a county shall be taken off to form a new county or a part

Giles County v. Marshall County.

thereof without the consent of two-thirds of the qualified voters in such part taken off; and where an old county is reduced for the purpose of forming a new one, the seat of justice in said old county shall not be removed without the concurrence of two-thirds of both branches of the legislature," etc.

For Giles county it is in defense particularized: First, that it was not competent for the legislature to take off such a part of that county, without making in the legislative act some provision for a submission of the question to the qualified voters residing within the territory sought to be detached, for an expression of their consent or dissent, in some mode.

We cannot adopt this view urged by complainant. The provision respecting the consent of the qualified voters applies only when a new county is to be formed or created. In that event "no part of a county shall be taken off to form a new county or a part thereof." By a "part thereof" is meant the taking of parts from two or more old counties to create a new one, as was the case presented to this court by the suit which involved the proposed county of Bell (named in honor of Tennessee's statesman, John Bell), passed on in *Cocke v. Gooch*, 5 Heisk. (52 Tenn.), 294. The attempt there was to form a county of Bell out of fractional parts to be taken from the existing counties of Hardeman, Fayette, and McNairy. Some test as to "consent" of the residents of the fractional parts in such case is requisite. But ever since the adoption of the Constitution of

Giles County v. Marshall County.

1870 the Legislature has passed acts, now very numerous, changing county lines by the shifting of territory without making any sort of provision to ascertain the will of those living in the area affected; and this, without any question being raised as to invalidity under the constitutional provisions invoked in this case.

But Giles county must prevail on an other contention—that the act detaching the territory in question is void, since the line of Marshall county as it was sought to be advanced and fixed reaches nearer than eleven miles of the courthouse of Giles county.

The immediate language of the Constitution is:

“No line of such county shall approach the courthouse of any old county from which it may be taken, nearer than eleven miles.”

Although the act of the legislature here in question was not passed for the purpose of creating a new county, and the constitutional inhibition would, at first blush, seem in terms, at least, to be directed against acts of that character, yet it has been given a more liberal construction to accord with the spirit of the clause and with the object in view, and to apply equally to acts passed for the purpose of taking territory from one county and adding it to another.

This liberal construction was given to the Constitution of 1834 (article 10, sec. 4), containing a similar provision, save that the limit of protection was twelve miles. *Gotcher v. Burrows*, 9 Humph. (28 Tenn.), 585.

And the same construction has been adopted for the clause of the Constitution of 1870. *Cheatham County v.*

Giles County v. Marshall County.

Dickson County, 39 S. W., 734; *McMillan v. Hannah*, 106 Tenn., 689, 61 S. W., 1020; *Union County v. Knox County*, 90 Tenn., 541, 18 S. W., 254, and cases cited.

The chief counter contention in behalf of Marshall county is that while the line cutting off the strip in question does trench to an extent on the constitutional rights of Giles county, yet that by far the larger portion of the detached territory lies more than eleven miles distant from the courthouse of Giles county at Pulaski, and that therefore the full measure of Giles county's remedy is to have the line forced back by a decree of court to a distance of eleven miles, leaving the remainder within the jurisdiction of Marshall county.

In the case of *Gotcher v. Burrows*, supra, the facts were that the legislature had passed an act attempting to detach two civil districts from Coffee county and to attach same to Grundy county, and the validity of the act was brought in question in a suit between the justices composing the *quorum* courts of the counties, respectively. This was tantamount to the suit being between the two counties in their corporate capacities. *Maury County v. Lewis County*, 1 Swan (31 Tenn.), 236; *Bridgenor v. Rodgers*, 1 Cold. (41 Tenn.), 260.

The line detaching the districts from Coffee county was at places within less than twelve miles of the courthouse of Coffee county. In other words, we understand that the line—required by the then Constitution (of 1834) to be at least twelve miles from the Coffee county courthouse—so ran as to put portions of the territory beyond, and parts within, the twelve-mile limit. The

Giles County v. Marshall County.

court held the legislative act void, and decreed that the right of Coffee county to the territory was the same as though the act had not been passed.

Referring to the constitutional restrictive provision the court, speaking through Judge McKinney, said:

“We construe it to be an absolute prohibition of the power, on the part of the legislature, either in the establishment of a new county, or in taking from one county a portion of its territory and attaching it to another, or in changing the lines of adjoining counties, to approach the courthouse of the county whose territory is taken for either of the foregoing purposes nearer than twelve miles. The restriction in question was designed to be a perpetual guaranty against legislative encroachment in whatever mode it might be attempted, and it is manifest that upon any other construction, the restriction would be utterly inoperative and unmeaning. . . . A constitutional provision, so wise and salutary in itself, so indispensably necessary for the protection of important interests, public as well as private, and no less essential to the quiet and repose of local communities, cannot be disregarded or evaded in the mode attempted in this case. We are of opinion that the act of 1846, chapter 134, is wholly unconstitutional and void, and therefore affirm the decree of the chancellor.”

In *Maury County v. Lewis County*, 1 Swan (31 Tenn.), 235, it appears that the creation of the county of Lewis was involved, a fraction of Maury county being taken to that end. The act of the legislature stipulated

Giles County v. Marshall County.

that the commissioners named should so run the line as to leave Columbia, the county seat of Maury county, twelve miles to the east in accordance with the Constitution of 1834; but the commissioners by error actually ran the line in such way as that at point or points it came within eleven and one-fourth miles of Columbia. The court said:

“If the act establishing the county of Lewis had designated the boundary in question to be as it was run by the commissioners, there is no question but that it would be considered a void exercise of power. . . . Regarding it as a void designation of boundary, the vested rights of Maury were not affected by it, but remain as if the boundary had not been made.”

This court in that case decreed the restoration to Maury county of—

“her original limits, as no boundary has been run for the county of Lewis in conformity to the limitations and restrictions contained in the Constitution.”

We cannot say that the legislature would have acted had the effort been one to detach only the portion of the territory that lies beyond the eleven-mile line, and undertake to reform the act or its results accordingly. It may be conceived that a case may arise where the influence prompting and moving that body came from persons who reside within, or a situation arising within, that portion of such an area which lies within the zone protected by the Constitution. We may not enter into an investigation as to the legislature's motive and

Giles County v. Marshall County.

thereby thus save such an act (as to claimed partial effectiveness) from unconstitutionality in the one case, and denounce it as a violation of the constitutional inhibition in the other.

The decree of the chancellor is affirmed.

G. W. WALKER v. BEULAH VANDIVER.

(Nashville. December Term, 1915.)

1. ABATEMENT AND REVIVAL. Pending action. Abandonment. What constitutes.

Where process in a former action was returned unserved, and plaintiff did not sue out alias writs from term to term, the original action was abandoned and discontinued within Shannon's Code, sec. 4445, declaring that the suing out of a summons is the commencement of an action if the action is continued by the issuance of alias process from term to term, and so the second action could not be abated on the ground of a former action pending. (*Post*, pp. 425, 426.)

2. ABATEMENT AND REVIVAL. Former action pending.

Defendant, a citizen of one county, removed to another county to avoid service, and was served in an action begun there. Thereafter he returned to the county of his residence and plaintiff then begun a new action in that county, defendant being duly served. He filed a plea in abatement and, after the filing of such plea, the first action was dismissed. *Held*, that in such case the dismissal occurring before the filing of the replication to the plea, the plea must be denied. (*Post*, pp. 426-432.)

Cases cited and approved: Knight's case, 2 Ld. Raym., 1014; Wright v. Kelfer, 131 Ill. App. 298; Nashville, etc., R. Co. v. Hubble 140 Ga., 368; Singer v. Scott, 44 Ga., 659; Frogg v. Long, 3 Dana (Ky.), 157; Com. v. Churchill, 5 Mass., 174; Le Clerc v. Wood, 2 Pin. (Wis.), 37; Curtis v. Piedmont Lumber, etc., Co., 109 N. C., 401; Rogers v. Hoskins, 15 Ga., 270; Chamberlain v. Eckert, Fed. Cas., No. 2576; Fowler v. Byrd, Fed. Cas., No., 4999a; Demond v. Crary (C. C.), 1 Fed., 480; Grider v. Apperson. 32 Ark., 332; Dyer v. Scalmanani, 69 Cal., 637; National Express Co. v. Burdette, 7 App. D. C., 551; Gage v. Chicago, 216 Ill., 107; Wright v. Kelfer, 131 Ill. App., 298; Jer-

Walker v. Vandiver.

seyville Shoe Mfg. Co. v. Bell, 125 Ill. App., 496; Moorman v. Gibbs, 75 Iowa, 537; George Bohon Co. v. Moren, 151 Ky., 811; Citizens' Nat. Bank v. Froman, 111 Ky., 206; Wilson v. Milliken, 103 Ky., 165; Draughn v. Wolf, 11 Ky., Law Rep., 366; Gist v. Shean, 8 Ky., Law Rep., 509; Manufacturers' Bottle Co. v. Taylor-Stites Glass Co., 208 Mass., 593; Nichols v. State Bank, 45 Minn., 102; Page v. Mitchell, 37 Minn., 368; Carson-Rand Co. v. Stern, 129 Mo., 381; Warder v. Henry, 117 Mo., 530; State v. Hines, 148 Mo. App., 298; Peterson v. Butte, 44 Mont., 129; Porter v. Kingsbury, 77 N. Y., 164; Averill v. Patterson, 10 N. Y., 500; Lord v. Ostrander, 43 Bart., 337; O'Beirne v. Lloyd, 31 N. Y. Super. Ct., 19; Trow Printing, etc., Co. v. New York Book Binding Co., 3 N. Y. Supp. 59; Beals v. Cameron, 3 How. Prac., 414; Smith v. White, 7 Hill, 520; Marston v. Lawrence, 1 Johns. Cas., 397; Farris v. Hayes, 9 Or., 81; Gardner v. Kiehl, 182 Pa., 194; Findlay v. Keim, 62 Pa., 112; Toland v. Tichenor, 3 Rawle, 320; Banigan v. Woonsocket Rubber Co., 22 R. I., 93; Trawick v. Martin Brown Co., 74 Tex., 522; Payne v. Benham, 16 Tex., 364; Langham v. Thomason, 5 Tex., 127; International, etc., R. Co. v. Barton, 24 Tex. Civ. App., 122; Texas, etc., R. Co. v. Kenna (Tex. Civ. App.), 52 S. W., 555; Norfolk, etc., R. Co. v. Nunnally, 88 Va., 546; Wright v. Suydam, 72 Wash., 587; Turner v. Lumbrick, 19 Tenn., 7-13.

FROM FRANKLIN

Appeal from the Circuit Court of Franklin County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
NATHAN L. BACHMAN, Judge.

FRANK L. LYNCH and FLOYD ESTILL, for plaintiff in error.

J. M. LITTLETON, FELIX LYNCH and H. M. TEMPLETON, for defendant in error.

Walker v. Vandiver.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

Miss Vandiver recovered a judgment against Walker based on the verdict of a jury for the sum of \$1,500 as damages for breach of a contract to marry, and the court of civil appeals affirmed the judgment. Walker has brought the record here on petition for *certiorari*, and makes a single assignment of error, which is that the court of civil appeals erred in holding that the replication to the plea in abatement was sufficient.

The plea in abatement was based on the pendency of two former suits for the same cause of action by plaintiff against defendant. The plea averred that one of said suits was pending in the circuit court of Franklin county at the time of the institution of the present suit, and the same averment was made in respect of the pendency of another suit in the circuit court of Bledsoe county; wherefore judgment was prayed of the summons and declaration in the present suit that they be quashed. To the foregoing plea in abatement plaintiff replied that when the summons in the former Franklin county action was sued out defendant had absconded, concealing himself so that service could not be had upon him, and that service of said summons was never made upon defendant, wherefore that action had been abandoned by plaintiff before the present suit was instituted.

The summons in the former Franklin county suit was issued on April 5, 1913, and the summons in the present suit was issued on November 28, 1913, and was executed by service upon defendant the same day it was

Walker v. Vandiver.

issued. It does not appear that alias process was issued from term to term in the action which was begun by issuance of the summons on April 5, 1913. See section 4445, Shannon's Code. There was no issuance of alias process returnable to the August term of the circuit court for the year 1913. We are therefore of the opinion that the former Franklin county suit had been abandoned and discontinued, and was not pending at the date of the institution of the present Franklin county action.

In addition to the above reply to the plea in abatement as to the former Franklin county suit it appears that said suit was formally dismissed by proper order in the circuit court of Franklin county made at its August term, 1914, and this dismissal was prior in date to the filing of the replication of the plaintiff to the plea in abatement, but after the plea was filed.

The reply made by plaintiff to the plea in abatement in respect of the Bledsoe county former suit was that at the time of the suing out of process in said action the defendant, who was a citizen of Franklin county, was in hiding in Bledsoe county, concealing himself there for the purpose of avoiding process. Nevertheless process was served upon him in said former Bledsoe county suit, and thereafter defendant returned to his home in Franklin county, whereupon plaintiff abandoned her suit in Bledsoe county, and instituted the present suit in Franklin county, and since the filing of the plea in abatement in the present cause on December 16, 1913, plaintiff has formally dismissed the Bledsoe county

Walker v. Vandiver.

suit by proper order entered of record therein in the circuit court of Bledsoe county.

Undoubtedly the Bledsoe county suit was a former suit pending at the date of the institution of the present suit.

It is insisted for defendant that according to the common-law rule plaintiff could not, after a plea in abatement of the pendency of a former suit, avoid the effect of the plea by setting up in reply a discontinuance or dismissal of the former suit. On this subject, in 1 Corpus Juris, p. 94 sec. 132, it is said:

“The rule at common law was to sustain the plea if it was true at the time it was filed. Accordingly, at common law plaintiff could not, after a plea in abatement of the pendency of a prior suit, avoid the effect of the plea by discontinuing the prior action”—citing Chitty Pl. (16th Am. Ed.) 470; *Knight's Case*, 2 Ld. Raym., 1014, 92 Reprint, 175, 1 Salk., 329, 91 Reprint, 290. And see *Wright v. Keifer*, 131 Ill. App., 298. “And this rule has been followed in some of the States”—cit-
Nashville, etc., R. Co. v. Hubble, 140 Ga., 368, 78 S. E. 919; *Singer v. Scott*, 44 Ga., 659 (under Georgia Code); *Frogg v. Long*, 3 Dana (Ky.), 157, 28 Am. Dec., 69; *Com. v. Churchill*, 5 Mass., 174; *Le Clerc v. Wood*, 2 Pin. (Wis.), 37. And see *Curtis v. Piedmont Lumber, etc., Co.*, 109 N. C., 401, 405, 13 S. E., 944. Compare, however, *Rogers v. Hoskins*, 15 Ga., 270. “In nearly all jurisdictions, however, the modern doctrine is that it is a good reply to a plea of the pendency of a prior action for the same cause that the former suit has been dis-

Walker v. Vandiver.

missed or discontinued, whether before or after the filing of the plea'' —citing United States: *Chamberlain v. Eckert*, Fed. Cas., No. 2,576, 2 Biss., 124; *Fowler v. Byrd*, Fed. Cas., No. 4,999a, Hempst., 213. But see *Demond v. Crary* (C. C.), 1 Fed., 480. Arkansas: *Grider v. Apperson*, 32 Ark., 332. California: *Dyer v. Scalmanani*, 69 Cal., 637, 11 Pac., 327. District of Columbia; *National Express, etc., Co. v. Burdette*, 7 App. D. C., 551. Illinois: *Gage v. Chicago*, 216 Ill., 107, 74 N. E., 726; *Wright v. Keifer*, 131 Ill. App., 298; *Jerseyville Shoe Mfg. Co. v. Bell*, 125 Ill. App., 496. Iowa: *Moorman v. Gibbs*, 75 Iowa, 537, 39 N. W., 832. Kentucky: *George Bohon Co. v. Moren*, 151 Ky., 811, 152 S. W., 944; *Citizens' Nat. Bank v. Froman*, 111 Ky., 206, 63 S. W., 454, 757, 23 Ky. Law Rep., 613, 56 L. R. A., 673, *Wilson v. Milliken*, 103 Ky., 165, 44 S. W., 660, 42 L. R. A., 449, 82 Am. St. Rep., 578. Contra, *Draughn v. Wolf*, 11 Ky. Law Rep., 366; *Gist v. Shean*, 8 Ky. Law Rep., 509. Massachusetts: *Manufacturers' Bottle Co. v. Taylor-Stites Glass Co.*, 208 Mass., 593, 95 N. E., 103. Minnesota: *Nichols v. State Bank*, 45 Min., 102, 47 N. W., 462; *Page v. Mitchell*, 37 Minn., 368, 34 N. W., 896. Missouri: *Carson-Rand Co. v. Stern*, 129 Mo., 381, 31 S. W., 772, 32 L. R. A., 420; *Warder v. Henry*, 117 Mo., 530, 23 S. W., 776; *State v. Hines*, 148 Mo. App., 298, 128 S. W., 250. Montana: *Peterson v. Butte*, 44 Mont., 129, 120 Pac., 231, 233, citing Cyc. New York: *Porter v. Kingsbury*, 77 N. Y., 164; *Averill v. Patterson*, 10 N. Y., 500; *Lord v. Ostrander*, 43 Barb., 337; *O'Beirne v. Lloyd*, 31 N. Y. Super. Ct., 19, 6 Abb. Prac. (N. S.), 387, re-

Walker v. Vandiver.

versed on other grounds 43 N. Y., 238; *Trow Printing, etc., Co. v. New York Book Binding Co.*, 3 N. Y. Supp., 59; *Beals v. Cameron*, 3 How. Prac., 414; *Smith v. White*, 7 Hill, 520; *Marston v. Lawrence*, 1 Johns. Cas., 397. Oregon: *Farris v. Hayes*, 9 Or., 81. Pennsylvania: *Gardner v. Kiehl*, 182 Pa., 194, 37 Atl., 829; *Findlay v. Keim*, 62 Pa., 112; *Toland v. Tichenor*, 3 Rawle, 320. Rhode Island: *Banigan v. Woonsocket Rubber Co.*, 22 R. I., 93, 46 Alt., 183. Texas: *Trawick v. Martin Brown Co.*, 73 Tex., 522, 12 S. W., 216; *Payne v. Benham*, 16 Tex., 364; *Langham v. Thompson*, 5 Tex., 127; *International, etc., R. Co., v. Barton*, 24 Tex. Civ. App., 122, 57 S. W., 292; *Texas, etc., R. Co. v. Kenna* (Tex. Civ. App.), 52 S. W., 555. Virginia: *Norfolk, etc., R. Co. v. Nunnally*, 88 Va., 546, 14 S. E., 367. Washington: *Wright v. Suydam*, 72 Wash., 587, 603, 131 Pac., 239, quoting Cyc.

In 1 Cyc., p. 25, the present rule is stated as follows:

“The tendency of the later cases and a preponderance of authority sustain the doctrine that it is a good answer to a plea of the pendency of a prior action for the same cause that the former suit has been discontinued, whether the discontinuance be before or after the filing of the plea. Under this doctrine the plea will be overruled unless the prior suit is pending at the time of the trial of the second.”

To sustain the above text a large array of authorities is cited.

It is insisted for defendant that this question is open in Tennessee. The point is, however, hardly maintain-

Walker v. Vandiver.

able under our authorities. It is laid down in Caruthers' History of a Lawsuit (4th Ed.) 169, that:

“If the plea in abatement is the pendency of another suit for the same cause of action, the former suit may be dismissed, and that fact being replied, the abatement is obviated.”

Turner v. Lumbrick, 19 Tenn. (Meigs), 7-13, was an action of forcible entry and detainer, to which the defendant pleaded a former suit pending wherein the same form of action between the same parties was being prosecuted, and prayed that the proceedings in the later suit be quashed. The plaintiff admitted that there was another action pending for the same cause between the same parties, but “elected of record to proceed in the present action, and released the defendant from all and every other action of forcible entry and detainer except the present.” Whereupon the trial court directed that the trial of the cause be proceeded with, and the verdict of the jury was in favor of the plaintiff on the issue thus made. In disposing of the question, Judge Green, speaking for the court, said:

“But the plaintiff having released of record, all other actions of forcible entry and detainer, the court refused to continue the cause. In this there is no error. If there was another suit pending for the same cause of action, this release might have been pleaded as an effectual defense.”

It is insisted for defendant that under the rule of the common-law the replication to the defendant's plea was insufficient, inasmuch as the plea was true at the

Walker v. Vandiver.

time it was made; that we have no statute changing the rule of the common law, and therefore it was the right of the defendant that the common-law rule should have been applied in the decision of this case. Without deciding whether the rule insisted upon ever became incorporated into the law of this State, it is manifest from the authorities above referred to that it has never been recognized by this court as a rule of law binding upon the courts of this State, and it is a rule opposed to the policy of our legislation in respect of remedial actions, and opposed to the general spirit of our legislation which seeks to have all controversies determined upon their merits rather than upon the technicalities of the formal procedure of the common law. The theory of the common law, as laid down in 1 Bacon Abr., 28 M., was that:

“The law abhors multiplicity of actions; and therefore whenever it appears on record that the plaintiff had sued out two writs against the same defendant for the same thing, the second writ shall abate; for, if it were allowed that a man should be twice arrested, or twice attached by his goods for the same thing, by the same reason he might suffer *infinitum*; and it is not necessary that both should be pending at the time of the defendant's pleading in abatement; for if there was a writ in being at the time of the suing out of the second, it is plain the second was vexatious, and ill *ab initio*.”

The reasoning above set out hardly suffices to answer the demands of justice under conditions which prevail at the present day. Especially is this true under our

Walker v. Vandiver.

system of jurisprudence. The dodging of process by the defendant in the present suit, culminating finally in the plea which we have been considering, furnishes a good illustration of the evils which grew up under the earlier decisions and led to the gradual abandonment of the older rule and the adoption of the modern one.

We think there is no merit in petitioner's assignment of error, and the same is therefore overruled, and the judgment of the court of civil appeals is affirmed.

Raulston et al. v. Marion County et al.

S. B. RAULSTON *et al* v. MARION COUNTY *et al*.

(*Nashville*. December Term, 1915.)

1. **STATUTES. Plurality of subjects.**

Acts 1915, ch. 682, providing for the issuance of bonds by a county to improve its roads without prejudice, and for the sale of said bonds and the building of roads and the appointment of pike commissioners, and to fix their duties and salary, and to provide for the expenditure of the funds and for the levying of a tax to pay the interest on the bonds, and to authorize the work of county prisoners on the pike roads, is not unconstitutional as embracing more than one subject; the entire purpose of the act being only to improve the county roads. (*Post*, pp. 434, 435.)

Acts cited and construed: Acts 1915, ch. 682.

2. **COUNTIES. Taxes. Property liable.**

It is within the power of a county to tax and assess all property within the county, both within and without corporate limits of municipalities, for the purpose of improving and constructing pikes, whether the money so obtained is expended within or without the municipalities; the general laws for dirt road construction not being applicable. (*Post*, pp. 435, 436.)

Cases cited and approved: *State v. Mayor, etc., of London*, 40 Tenn., 263; *De Tavernier v. Squire Hunt*, 53 Tenn., 600; *King v. Sullivan County*, 128 Tenn., 393; *Todtenhausen v. Knox County*, 132 Tenn., 169.

FROM MARION.

Appeal from the Chancery Court of Marion County.
—FOSTER H. MERCER, Chancellor.

T. T. RANKIN, for appellants.

133 Tenn. 28.

Raulston et al. v. Marion County et al.

ALLISON, LYNCH & PHILLIPS, C. C. MOORE and JNO. T. RAULSTON, for appellees.

MR. JUSTICE FANCHER delivered the opinion of the Court.

This suit involves the constitutionality of chapter 682, Acts 1915, which is an enabling act authorizing Marion county, through its county court, to issue \$100,000 of bonds for the improvement of public roads. The county voted the bonds and took the preliminary steps for the issuance of same, and on August 25, 1915, this suit was brought by certain taxpayers of Marion county against the county, its officers, and the pike road commissioners, to enjoin the issuance of the bonds. The caption of the act is as follows:

“An act authorizing Marion county, Tennessee, through its quarterly court, to issue bonds of said county for the purpose of improving the public roads of said county, the building of bridges where necessary, the sale of said bonds, the building of certain specific roads, the appointment of pike commissioners, and to fix their duties and salary; to provide for the expenditure of the funds; and to provide for the levying of a tax to pay the interest and the principal of the bonds, and to authorize the working of county prisoners on the pike roads of said county, and to direct the pike commissioners to make recommendations to the county court in reference to certain uses of said road being declared a privilege,” etc.

One assignment of error attacks the constitutionality of the act on the ground that it embraces more than one

Raulston et al. v. Marion County et al.

subject. It is said that it legislates out of office the old pike commissioners, and that it provides for an expenditure of bond funds within the corporate limits of South Pittsburg; that it provides for the maintenance of the county pikes, as distinguished from improvements and construction thereof, and also provides for the leasing of county prisoners to private contractors. The act in question is not subject to this attack. Only one subject is embraced in the caption, namely, the improvement of the public roads of the county, and to this end the county is enabled to issue bonds. Various provisions are made for the purpose of carrying out the general purposes of the act.

The use of the county prisoners mentioned in the act is for the purpose of working these roads.

The expenditure of funds within the corporate limits of South Pittsburg is but a part of the constructive work provided for, and the roads running through the municipality are as much for a county purpose as those outside the municipality. This is true though the general law upon the subject of keeping up the public roads by tax levy, road hands, etc., does not apply to incorporated cities or towns, except such towns as are not taxed to keep up their streets, as provided by Shannon's Code, sec. 1679. The law under such general statutory provisions contemplated a separate maintenance by the municipalities of their streets and the counties of their roads, so that the county court had no control over roads within the limits of incorporated towns and cities, and could not assess their inhabitants with roadwork

Raulston et al. v. Marion County et al.

nor with a tax, to be worked and expended, either within or without the limits of such municipalities, *State v. Mayor, etc., of London*, 3 Head, 263; *De Tavernier v. Squire Hunt*, 6 Heisk., 600. This act is for a somewhat different purpose to the ordinary working of dirt roads in a county. The legislature makes provisions by this act for the improvement of public roads by the construction and maintenance of pikes, and taxes the whole people of the county for that purpose, which it may lawfully do, even though the whole fund should be used outside the corporate limits of a municipality. *King v. Sullivan County*, 128 Tenn., 393, 160 S. W., 847. This act contemplates a system of pikes embracing those within as well as those without the limits of South Pittsburg. If it is a county purpose to tax the people of the municipality to build pikes without its limits, as held in *King v. Sullivan County*, then surely it is no less a county purpose to build and repair the pikes within and without the city, and it embraces but one subject.

The provision in regard to the old commissioners turning over funds to the new commissioners comes within the one single purpose of the act. All these means and instrumentalities pointed out are for the one single purpose expressed in the caption. The general principle involved is so well settled it needs no authority to be cited. We refer, however, to *Todtenhausen v. Knox County*, 132 Tenn., 169, 177 S. W., 489.

We find no error in the decree of the chancellor dismissing the bill upon demurrer, and the same is affirmed.

McDowell v. Hunt Contracting Co.

McDOWELL v. HUNT CONTRACTING CO. *et al.**(Nashville. December Term, 1915.)*

1. EQUITY. Dismissal of bill. Effect as to cross-bill.

The complainant's dismissal of the original bill ordinarily carries with it the cross-bill or the answer when filed as a cross-bill; but, where neither the cross-bill nor the answer filed as a cross-bill sets up ground for affirmative relief on which proof has been taken, the dismissal of the original bill does not carry with it the cross-bill or answer filed as a cross-bill, but leaves such cross-bill in court for prosecution to final decree. (*Post*, pp. 441, 442.)

Case cited and approved: *Partee v. Goldberg*, 101 Tenn., 664.

2. EQUITY. Dismissal of bill. Effect as to cross-bill. New matter.

Complainant, member of a firm, filed his bill to attach and impound defendant's judgment against the firm to satisfy an indebtedness due him from the defendant, and made the defendant's solicitor in the recovery of the judgment, having a lien thereon to secure his reasonable fee, a party defendant, that the court might determine the amount of his fee, and that complainant might subject the remainder of the judgment to his own claim, and the defendant answered denying any liability, and filed its answer as a cross-bill against the solicitor to have his fee adjudicated; jurisdiction over the solicitor, a non-resident, being obtained in the county by the fact that another party defendant to the original bill resided in that county. The complainant and the defendant compromised their differences, and the complainant's firm agreed to pay a certain amount into court upon the solicitor's release of his lien, which was done, whereupon complainant dismissed his suit, and the chancellor, on motion of the defendant solicitor, dismissed the cross-bill. *Held*, on defendant's appeal from the dismissal of the cross-bill,

McDowell v. Hunt Contracting Co.

that such dismissal was proper, as after the dismissal of the original bill the jurisdiction over the defendant to the cross-bill was released, and there was no reason for holding him before the court, and the cross-bill sought no new matter but the same relief. (*Post*, pp. 442, 443.)

Cases cited and approved: *Elderkin v. Fitch*, 2 Ind., 90; *Ables v. Planter's etc., Ins. Co.*, 92 Ala., 383.

3. **APPEAL AND ERROR.** Matters reviewable. "Cross-bill."

A "cross-bill" is auxiliary to and dependant on the original litigation and incorporates itself within and becomes a part of the original bill, so that it is one suit, and so wedded together are the two bills that an appeal takes them both up. (*Post*, pp. 443, 444.)

4. **EQUITY.** Cross-bill. Answer.

While the statute, Shannon's Code, sec. 6133, allows an answer to be filed as a cross-bill against the original complainant, it is improper to incorporate in an answer to the bill a cross-bill against other parties. (*Post*, pp. 444, 445.)

Case cited and approved: *Hall v. Fowlkes*, 56 Tenn., 754.

Code cited and construed: Sec. 6133 (S.).

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.—Jno. ALLISON, Chancellor.

M. P. ESTES and H. M. CARR, for appellant.

GREEN, WEBB & TATE and J. W. STAPLES, for appellee.

McDowell v. Hunt Contracting Co.

MR. JUSTICE FANCHER delivered the opinion of the Court.

The Hunt Contracting Company recovered a judgment in the supreme court at Knoxville against the McDowell Construction Company for the sum of \$9,245. J. R. McDowell, who was a member of the firm composing the McDowell Construction Company, filed the bill in this case for the purpose of attaching and impounding said recovery to satisfy an indebtedness of about \$8,000, alleged to be due him by the Hunt Contracting Company. Horace M. Carr was the solicitor for the Hunt Contracting Company in the recovery of the judgment in the supreme court at Knoxville, and a lien was declared by the court in that case to secure his reasonable fees. By reason of this lien of H. M. Carr, he was made a defendant to the bill filed in this cause by McDowell, so that the court might determine the amount of his fee and to the end that complainant might subject the remainder of said judgment to the satisfaction of his claim.

The bill was for no other purpose than to attach whatever fund might be due the Hunt Contracting Company after the fee of H. M. Carr was adjudicated. The Hunt Contracting Company by answer denied any liability due McDowell, but also filed its answer as a cross-bill against said Carr to have his fee adjudicated. The defendant Carr filed his answer in which he claimed that he was entitled to a fee of not less than \$4,000. Jurisdiction was obtained in Davidson county in this cause by reason of the fact that one Calhoun, who re-

McDowell v. Hunt Contracting Co.

sided in Davidson county, was a party defendant to the original bill. After the pleadings were made up and before any proof was taken, the complainant, J. R. McDowell, and the Hunt Contracting Company, compromised all their differences, and it was agreed that, in case the McDowell Construction Company would pay into the hands of the supreme court clerk at Knoxville \$3,500, said Carr would sign a release of his lien upon the recovery and look alone to this \$3,500 so deposited for the satisfaction of his claim; the said Carr concurring in this settlement. The McDowell Construction Company thereupon paid into the hands of the clerk of the supreme court \$3,500, and the said H. M. Carr released his lien on the remainder of the recovery. When this was done, J. R. McDowell, complainant in the present case, dismissed his suit in the chancery court at Nashville and assumed all the costs of the case. Thereupon the chancellor, on motion of defendant Carr, dismissed the cross-bill. It is from the order dismissing the cross-bill that this appeal is taken by the Hunt Contracting Company.

Appellant contends that the cross-bill should have been retained in court in order to adjudicate the amount of the fee of H. M. Carr, and that the chancellor was in error in dismissing said cross-bill, and this is the issue presented for our determination.

Preliminary to the disposition of the matter, it may be said that the cross-bill against H. M. Carr could not have been prosecuted for want of jurisdiction over him in the chancery court at Nashville had it not been for

McDowell v. Hunt Contracting Co.

the fact that the original bill, by making a party residing in Davidson county a defendant, had brought Carr before the court; he being a nonresident of Davidson county.

The original bill in the cause asked for the adjudication of Carr's fee, as did also the cross-bill. Will the dismissal of the original bill so dispose of the litigation as that the cross-bill should necessarily be also dismissed?

The dismissal of the original bill by the complainant ordinarily carries the cross-bill with it, or the answer when filed as a cross-bill, but when either the cross-bill or the answer filed as a cross-bill, sets up grounds for affirmative relief on which proof has been taken, the dismissal of the original bill by the complainant does not carry with it the cross-bill, or answer filed as a cross-bill, but leaves such cross-bill in court for prosecution to final decree.

This statement of the rule is contained in Gibson's Suits in Chancery, sec. 726, and is a statement supported by the Tennessee authorities. *Partee v. Goldberg*, 101 Tenn., 664, 49 S. W., 758. See, also, Story's Eq. Pleading, sec. 399, note.

In the case of *Partee v. Goldberg*, Judge Wilkes, who delivered the opinion, reviewed the authorities upon the question, and held that an answer filed as a cross-bill has the same force and effect as if the defendant had answered and then filed a cross-bill, and is not limited to the purposes of defense alone, but is an auxiliary suit for the purpose of enforcing rights growing out

McDowell v. Hunt Contracting Co.

of the transaction involved in the original suit but set out in the cross-bill and of bringing forward offsets and counter demands. Attention is called in that case to the fact that Chancellor Cooper held, in 3 Tenn. Ch. 284, that a cross-bill is simply defensive, and if the original bill is dismissed the defense necessarily fails also, and although a regular cross-bill might in some cases be treated as an original bill, no such favor can be shown to an answer filed as a cross-bill, and in that case he held that the answer filed as a cross-bill must go with the original bill, though it charged facts calling for affirmative relief. The court, however, stated, in *Partee v. Goldberg*, that when the cross-bill sets up additional facts relating to the subject-matter embraced in the original bill, but which facts are not alleged in the original bill, and asks affirmative relief, the dismissal of the original bill does not dispose of the cross-bill, citing 5 Enc. Pl. & Prac., 663, and cases in footnotes.

The particular question here presented is somewhat different from that decided in *Partee v. Goldberg*. In that case it was a question as to whether the defendant's cross-bill against the original complainant should be allowed to stand after proof had been taken and after complainant had voluntarily dismissed his original bill, the cross-bill averring facts upon which specific and affirmative relief was claimed and might be granted. The present suit is one where one defendant has filed a cross-bill against another defendant and where jurisdiction could not have been gained on the defendant to the cross-bill but for the fact that he was

McDowell v. Hunt Contracting Co.

rightly brought before the court under the original bill.

It is stated in 5 Enc. Pl. & Prac., p. 664:

“Whether or not, in the absence of a statute, a cross-bill by a defendant against a codefendant for relief will be sustained after dismissal of the original bill, is doubtful; probably it will not.”

The text cites *Elderkin v. Fitch*, 2 Ind., 90; *Ables v. Planters', etc., Ins. Co.*, 92 Ala., 383, 9 South., 423. In *Elderkin v. Fitch*, the original bill was dismissed. One defendant had filed a cross-bill against another defendant. The court considered the cross-bill a dependency merely upon the principal bill, and that the two together made but one suit, and hence the dismissal of the original bill must carry with it out of court the appendage.

We are of the opinion that the chancellor was correct in dismissing the cross-bill in the present case. Defendant H. M. Carr was only in court by virtue of the jurisdiction had of his person by the original bill. Defendant Hunt Contracting Company took advantage of this jurisdiction of its codefendant in order to maintain its cross-bill in the suit for the adjudication of the amount of his fee. Defendant Carr was entitled to pursue his lien in the form and manner he desired but for the fact that he was brought before the court in this manner. When the original bill was dismissed, there was no longer any reason for holding him before the court. The jurisdiction over his person was thereby released, and his codefendant, the Hunt Contracting

McDowell v. Hunt Contracting Co.

Company, had no right to compel him thereafter to submit to the jurisdiction of the court. To do so would be to force him to submit to a trial before a court foreign to his residence after the bill bringing him before the court had been dismissed, the complainant in the dismissed bill thereafter having no interest in the cross-bill.

The cross-bill was ancillary to the original bill in this case, and could only be maintained by virtue of the filing of the original bill. A cross-bill is only auxiliary and is a dependency on the original litigation. It incorporates itself within and becomes a part of the original bill so that it is one suit, and so wedded together are the two bills that an appeal takes them both up. Gibson's suits in Chy., sec. 726.

The reasons for compelling a complainant to submit to the adjudication of affirmative matters set up in a cross-bill against him, though he dismisses his original bill, are wholly wanting in the present controversy. This is a litigation between two defendants. When the original bill was dismissed, it necessarily dismissed the cross-bill in so far as it sought relief against H. M. Carr, the codefendant. This conclusion is also reached for the reason that the original bill sought the same relief, namely, the adjudication of Carr's fee, which was sought in the cross-bill. Therefore no new matter was presented by the cross-bill.

We do not mean to admit that a defendant may properly incorporate in his answer to the original bill a cross-bill against another defendant. Such practice

McDowell v. Hunt Contracting Co.

would tend to confuse pleadings. While our statute allows an answer to be filed as a cross-bill against the original complainant (Shannon's Code, 6133), it is improper to make an answer a cross-bill against other parties. Gibson's Suits in Chancery, sec. 734; *Hall v. Fowlkes*, 9 Heisk. (56 Tenn.), 754. But we have treated the matter as waived by defendant Carr in filing his answer to the cross-bill.

Affirmed.

The State v. Turnpike Co.

THE STATE v. COLUMBIA, GODWIN & SANTA FE TURN-
PIKE Co.

(*Nashville.* December Term, 1915.)

1. **CONSTITUTIONAL LAW.** Classification. Population. Turn-
pike road.

Acts 1905, ch. 534, as amended by acts 1907, ch. 242, requiring a turnpike company, whose charter permitted tolls to be charged, after the turnpike had been metaled as required by Shannon's Code, sec. 1764, to coat such metaling with a coat of sand, gravel or ground rock, restricted in its application to counties having a population of not more than 42,750, and not less than 42,700, according to the federal census, thus limiting it to turnpikes in one county, was a violation of Const. art. 11, sec. 8, declaring that no one shall be deprived of life, liberty, or property but by the law of the land, since while legislative acts made special by the use of the population standard for classification may be restricted to certain counties in their political capacity, it deprived the company of its property rights without affecting others in like condition elsewhere in the state, and since the duty imposed in such county upon a margin of fifty of population had no substantial and just relation to that county apart from other counties in which turnpike roads were operated. (*Post*, pp. 449, 450.)

Acts cited and construed: Acts 1907, ch. 242; Acts 1905, ch. 534.

Case cited and approved: Restricting cases, 111 Tenn., 234.

Code cited and construed: Sec. 1764 (S.).

Constitution cited and construed: Art. 11, Sec. 8.

2. **STATUTES.** "General law." "Special law." Turnpike roads.
Constitutionality.

Acts 1905, ch. 534, as amended by acts 1907, ch. 242, was in violation of Const. art. 11, sec. 8, forbidding the increase or dimi-

The State v. Turnpike Co.

nution of the powers of private corporations by special laws, as it did not embrace all of the class to which it was naturally related, and created a preference or established an inequality; a "special law," in the constitutional sense, being one relating to particular persons or things of a class to which they legitimately belong, a law which, by force of no inherent limitation, arbitrarily separates or segregates some person or thing from those upon which but for such separation it would operate; and a "general law," within the provision of such section that corporations shall be formed under general laws, but shall not be created by special laws, is one by which all persons complying with its provisions may be entitled to exercise powers, rights and privileges conferred, while a "special law" confers on certain persons rights and powers, or imposes liabilities not granted to or imposed on others similarly situated (citing 4 Words and Phrases, Second Series, Special Law; see also, Words and Phrases, First and Second Series, General Law). (*Post*, pp. 450-454.)

Cases cited and approved: *Van Cleve v. Passaic, etc.*, Com., 71 N. J. Law, 183; *Applegate v. Taylor*, 224 Mo. 393; *Strawn v. Harris*, 54 Or., 424; *State v. Hamer*, 42 N. J. Law, 440; *Alexander v. Elizabeth*, 56 N. J. Law, 71; *State v. Railway*, 124 Tenn., 1; *Safe Deposit, etc., Co. v. Fricke*, 152 Pa., 231; *Pasadena v. Stimson*, 91 Cal., 238; *Murray v. Board of Com.*, 81 Minn., 359; *Hamilton County Com'rs v. Rosche*, 50 Ohio St., 103; *Strong v. Diddan*, 207, Ill., 385; *Weinman v. Railway Co.*, 118 Pa., 192.

Constitution cited and construed: Art. 11, sec. 8.

FROM MAURY.

Appeal from the Circuit Court of Maury County.—
W. B. TURNER, Judge.

The State v. Turnpike Co.

FRANK M. THOMPSON, Attorney-General, for the State.

W. S. FLEMING, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This is an appeal by the State of Tennessee from a judgment of the circuit court, sustaining a demurrer to an indictment of the turnpike company. The indictment charged that the company had unlawfully failed, after metaling its turnpike as required by Code (Shannon) section 1764, to spread immediately upon said metaling a coat of dirt, sand, gravel, or ground rock, and that the company had continued to take toll notwithstanding.

The demurrer attacked the constitutionality of the act which required such a coating be so placed on the roadway, same being Act 1905, chapter 534, amended by Act 1907, chapter 242, and among the grounds of attack were the following:

That the act was void, under article 11, sec. 8, of the Constitution, because an attempt to create an arbitrary and unreasonable class and subject the company to liability as a member of that class, and, further, because violative of article 11 section 8, of the Constitution which provides:

“No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the or-

The State v. Turnpike Co.

ganization of all corporations, hereafter created," etc.

The form of charter, prescribed by the general incorporation acts for the appellee company and all other turnpike companies in this State, stipulated that toll might be charged after the pike had been metaled, "the stone of the last coat to be broken of a size not exceeding one-half pound in weight."

The above acts which required a different coating by their terms were restricted in application to counties having a population of not more than 42,750 nor less than 42,700, according to the federal census of 1900 or any subsequent federal census. This confined the operative force of the acts to turnpikes in Maury county, at least until the happening of the remote contingency that under some subsequent census some other county having turnpikes in its borders will fall into the class.

We are of the opinion that it is not competent for the legislature to pass laws thus operating on corporations to increase or diminish their powers or duties, when chartered under the laws of this State, or make their application or force restricted to less than all the counties of the State, by the use of such a population basis for classification.

It is a mistaken idea, all too prevalent judging from recent legislation, that, because classification on the basis of population is sustainable in respect of legislation on certain subjects, it may be appropriate for all purposes of classification in legislative enactments. This erroneous conception, if further indulged by legisla-

The State v. Turnpike Co.

tures and upheld by the courts, would soon render the constitutional prescription and safeguard a dead letter. If classification by population were deemed permissible of adoption for every purpose, each county and municipality may for its government be provided with a distinct code of laws, general in mere form, but special or local in substance and fact.

Legislative acts made special, by the use of the population standard for classification, may be restricted to affect a certain county or counties in their political or governmental capacity, but where such legislation is designed immediately to affect the rights of the citizen, whether a natural or artificial person, in his or its property rights, without affecting others in like condition elsewhere in the State, it may be unconstitutional. *Redistricting Cases*, 111 Tenn., 234, 80 S. W., 750.

In article 11 section 8, of the Constitution we have a positive and explicit inhibition on the increase or diminution of the powers of private corporations by special laws. A "special law" is one that relates to particular persons or things of a class to which they legitimately belong, as distinguished from a "general law," which applies to all persons or things of a class. A law becomes special, in a constitutional sense, when by force of no inherent limitation it arbitrarily separates or segregates some person or thing from those upon which, but for such separation, it would operate. 4 Words and Phrases, Second Series, 635; *Van Cleve v. Passaic, etc., Com.*, 71 N. J. Law, 183, 58 Atl., 571; *Applegate v. Taylor*, 224 Mo., 393, 123 S. W., 892.

The State v. Turnpike Co.

Thus, a "general law" within the meaning of a constitutional provision that corporations may be formed under general laws, but shall not be created by special laws, is one by which all persons complying with its provisions may be entitled to exercise powers, rights, and privileges conferred, while a "special law" is one conferring on certain persons rights and powers or imposing liabilities not granted to or imposed upon others similarly situated. *Straw v. Harris*, 54 Or., 424, 103 Pac., 777.

Interdicted special laws are those, the vice of which is that they do not embrace all of the class to which they are naturally related; they create preferences or establish inequalities of burden. "The true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as a basis for classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and objects or places excluded." *State v. Hamer*, 42 N. J. Law, 440; *Alexander v. Elizabeth*, 56 N. J. Law, 71, 28 Atl., 51, 23 L. R. A., 525; *State v. Railway*, 124 Tenn., 1, 135 S. W., 773, Ann. Cas., 1912D, 805; 6 R. C. L., p. 381, sec. 374.

It cannot be that a special law, within the meaning of the above clause, is only such an one as by name designates or identifies the corporation concerned.

The State v. Turnpike Co.

Identification in instances may be as practically effectual by the use of the population standard as by name; and identification, in such mode, is not necessarily classification, but may be the isolation against which the constitutional provision is directed.

The framers of our Constitution intended to express that the functioning of private corporations thereafter should have relation, so far as place is concerned, to the State and not to territorial limits less than that. There had been experienced in this commonwealth hardships incident to the inequality in the benefits and burdens imposed on private corporations by legislative action. The want of uniformity in laws creating and governing private corporations was the mischief that the constitutional inhibition was designed to correct. No longer was the legislature, by way of the courtesy too often shown to local representatives, or by way of favor to combinations of men in a particular locality, to be "transformed from a tribunal of the people into a mere shop for seekers after special privilege" in the form of corporate rights peculiar to the seekers themselves, or in the form of corporate burdens on others imposed for their advantage. It was considered that if a proposed enactment was salutary, its benefits should be shared by all in the State interested therein; that if it was unwise, it should not be passed without challenging the attention, judgment, and vote of all the representatives in both branches of the General Assembly.

The State v. Turnpike Co.

The population standard has been held to be illusory and inadequate for constitutional classification in legislation relating to the following subjects: The creation of liens for water rents (*Safe Deposit, etc., Co. v. Fricke*, 152 Pa., 231, 25 Atl., 530); the mode and conditions of exercising the power of eminent domain (*Pasadena v. Stimson*, 91 Cal., 238, 27 Pac., 604); providing for the treatment of inebriates, at the expense of the public, the evils of intemperance not being bounded by county lines (*Murray v. Board of Com.*, 81 Minn., 359, 84 N. W., 103, 51 L. R. A., 828, 83 Am. St. Rep., 379); regulating the right of taxpayers to recover money erroneously paid on property exempt from taxation (*Hamilton County Com'rs v. Rosche*, 50 Ohio St., 103, 33 N. E. 408, 19 L. R. A., 584, 40 Am. St. Rep., 653); the regulation of the practice of probate courts in manner of selecting and appointing public administrators (*Strong v. Dignan*, 207 Ill., 385, 69 N. E., 909, 99 Am. St. Rep., 225).

Coming to a consideration of the legislative acts under review: How can it be conceived that the particular duty attempted to be imposed on turnpike corporations in Maury county, or in counties possible to be covered by the margin of fifty of population, does not sustain as true, substantial and just relation to Giles county or to other counties in the State where turnpikes are operated by corporations? How is the imposition of the duty respecting the mode of coating pikes reasonably appropriate to the one place, as evincing some intrinsic characteristic or need, and not to the others?

The State v. Turnpike Co.

May turnpike companies in the one county be thus hobbled while those in other counties may, by the exercise of the same legislative power, if conceded to exist, be favored or facilitated by a lessening of their duty or burden in the same regard?

To so hold would be to run counter to the manifest intent of the framers of the constitution to get away from a patchwork system of corporation laws, and for us to return to the system that formerly existed, which led naturally and inevitably to the granting of special corporate privileges and the imposition of peculiar burdens, and which the constitutional convention was solicitous to abolish.

Clearly the objects sought to be operated on and regulated are not counties of any class, or county concerns, but the effort is to regulate entities by the application to them of a standard that properly relates not to them but to counties.

The only case that has come under our observation where such a segregation of private corporations for regulation was involved is that of *Weinman v. Railway Co.*, 118 Pa., 192, 12 Atl., 288. There an act to provide for the incorporation and regulation of certain railway companies in cities of the second and third class was held to be special and in contravention of the Constitution of that State.

There being no error in the ruling of the circuit judge, an affirmance results.

McKee v. Hughes.

T. J. McKEE v. WM. HUGHES et al.*(Nashville. December Term, 1915.)***1. TORTS. Resort to legal proceedings. Petition to revoke merchant's license.**

Where a number of residents of a town petitioned the mayor and board of aldermen to revoke the defendant's license as a general merchant on the ground that his store was a public nuisance, pursuant to which the board illegally revoked the license, but the petition was signed and presented without malice and in the honest belief that the board had power to act, defendants were not liable for plaintiff's loss occasioned by the revocation, since their action was a lawful exercise of the right to apply by address to government authorities for the redress of grievances secured by Const. art. 1, sec. 23. (*Post*, p 458.)

2. CONSPIRACY. Merchant's license. Petition to revoke. "Civil conspiracy."

Defendants' motive being the public good, and they being not actuated by malice or intent to injure plaintiff, their action in signing and presenting such petition was not a conspiracy, since a "civil conspiracy" is a combination between two or more persons to accomplish by concert of action an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means; the damage being the gist of any action (citing Words and Phrases, Second Series, Civil Conspiracy). (*Post*, pp. 459-462.)

Cases cited and construed: Louisiana Citizen's Bank v. Orleans Parish Board (C. C.), 54 Fed., 73; Vanarsdale v. Lavery, 69 Pa., 103.

Constitution cited and construed: Art. 1, sec. 23.

3. LIBEL AND SLANDER. Privilege. Legal proceedings.

Such petitions are privileged only in the absence of malice on the part of the petitioners. (*Post*, pp. 462, 463.)

McKee v. Hughes.

Cases cited and approved: *White v. Nicholls*, 3 How., 266; *Kent v. Bongartz*, 15 R. I., 72; *Wieman v. Mabee*, 45 Mich., 484; *Dennehy v. O'Connell*, 66 Conn. 175.

4. CONSPIRACY. Merchant's license. Petition to revoke. Malice. Presumption.

In addressing such a petition to the municipal authorities, the petitioners are presumed to act without malice; the burden being on the party complaining to show the contrary. (*Post*, p. 463.)

Cases cited and approved: *Ambrosius v. O'Farrell*, 119 Ill. App., 265; *Van Wyck v. Aspinwall*, 17 N. Y., 190.

5. EVIDENCE. Presumption. Knowledge of law.

The presumption of knowledge of the law cannot be made the basis of imputed bad faith on defendants' part in presenting such petition to the board for the abatement of a condition not a nuisance *per se* which could be legally abated only by judicial proceedings. (*Post*, pp. 463-465.)

Cases cited and distinguished: *Harrison v. Bush*, 5 Ellis & Blackb., 344; *Fairman v. Ives*, 5 B. & Ald., 642.

FROM MAURY.

Appeal from the Circuit Court of Maury County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court—W. B. TURNER, Judge.

J. L. JONES, J. C. VOORHIES and R. S. HOPKINS, for plaintiff.

HOLDING & GARNER and J. H. DENNING, for defendants.

McKee v. Hughes.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

McKee brought this suit against a large number of the residents of the village of Spring Hill, Maury county, to recover damages, his declaration containing several counts, all of which, save the fourth, have been eliminated by the verdict of the jury and the rulings of the court of civil appeals. In this fourth count it was averred that Spring Hill is incorporated, and has a board of mayor and aldermen, from which plaintiff had procured a license to do the business of a general merchant; that under this license he conducted a store for the sale of merchandise and had a prosperous business, when the defendants unlawfully conspired together to stop and destroy his business, and for that purpose signed and delivered to the board of mayor and aldermen the following petition addressed to that body:

“We, the undersigned citizens, do hereby petition your honorable body to declare the store conducted by T. J. McKee a public nuisance, and we further petition you to abate this nuisance by revoking his license and closing up his place of business.

“This 27th day of August, 1913.”

This paper was signed by nineteen of the defendants.

It was further averred that the said board passed a resolution reciting that “numerous complaints have been made that T. J. McKee has been and is conducting a place of business which is a nuisance, and whereas a formal petition has been presented to us numerous

McKee v. Hughes.

signed by citizens, be it resolved that we hereby revoke the license issued to T. J. McKee," and that the marshal of the town be authorized to deliver to McKee a check rebating him a part of the license sum prepaid, "and to notify him that he can no longer conduct his place of business under penalty of the city laws."

It is averred also that by reason of the above, plaintiff's business was stopped and destroyed, to his damage, etc.

The trial judge instructed the jury that the defendants had a right under the law to petition the village council for redress of grievances, and that they were not bound to see that the details of that council's action with reference to their petition were absolutely legal. Further that there was no liability shown under the fourth count.

The court of civil appeals reversed the judgment of the circuit court because of the above ruling; and we are asked to grant the writ of *certiorari* and to review the judgment of reversal.

We have no difficulty in following the court of civil appeals to its conclusion that the action of the village council in undertaking to revoke the license and in notifying McKee that he could no longer conduct his business was unwarranted by law; but we are unable to follow that court in the ruling that the defendant petitioners must respond in damages on the ground that in presenting said petition they conspired to and did cause injury to plaintiff unlawfully.

McKee v. Hughes.

There was proof adduced by plaintiff that tended to show that he had been injured by the action taken by the city marshal under the resolution of the council. But are defendants liable as conspirators?

A "civil conspiracy" may be defined to be a combination between two or more persons to accomplish by concert of action an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means; the damage caused being the gist of any action. 5 R. C. L., 1061, 1091; 1 Words and Phrases, Second Series, 910.

The defendants in assembling and petitioning the village council, were proceeding in the exercise of a high constitutional privilege. By the Declaration of Rights embodied in our Constitution (article 1, sec. 23) it is provided:

"That the citizens have a right, in a peaceable manner, to assemble together for the common good, to instruct their representatives, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by address or remonstrance."

In 8 Cyc., 894, citing *Louisiana Citizens' Bank v. Orleans Parish Board* (C. C.), 54 Fed., 73, the rule is stated to be:

"The right of assembly and petition is guaranteed by the Constitutions, which secure to every person, natural or artificial, the right to apply to any department of the government for the redress of grievances, or the bestowal of a right, and also guarantee the enjoy-

McKee v. Hughes.

ment of such redress of the grievances, . . . when obtained, free from any penalty for having sought or obtained it.”

We think that this with modification to be noted below, is a correct statement of the law.

We have been cited to but a single case in which a court has dealt with liability for conspiracy predicated upon the defendants signing a petition to those invested with governmental power for redress of grievances or setting forth instructions by way of an expression of their wish or will.

The court of civil appeals grounded its ruling upon the authority of that case, *Vanarsdale v. Laverty*, 69 Pa., 103, 109.

The petition in that case was addressed to the district school directors by defendants, who were patrons of the school which had been taught by Laverty. The petition expressed their wish that Laverty be not employed for the ensuing school term under any circumstances and the willingness of the petitioners to accept any other competent teacher that the board might select. The action of Laverty was on the case for conspiracy, and malice was charged to have colored the effort made by defendants to prevent the directors from employing plaintiff. Referring to the petition, the court said:

“It preferred no charges and gave no reasons, and was a simple expression . . . of the wishes of the signers. It was the right of these citizens of the district thus to declare their desire. They had a right to express a preference or to declare their objection to

McKee v. Hughes.

any one applying for appointment. They were deeply interested, and had therefore a right to speak out. But we cannot recognize the position to which the argument of the plaintiffs in error leads, that such a right of expression can be made a channel through which men may gratify their malice and enmity. This would be the actual result of the argument that the right of petition is so sacred that the private purposes and motives of the actors cannot be inquired into. If they cannot, and if the real purpose of the petition be the gratification of ill will and malice without cause, then men may be borne down by the power of their enemies, especially in numbers and by combination. . . . A groundless petition instigated only by malice cannot surely be the right of any citizen where it . . . results in harm to the object of its malicious purpose."

The court, moreover, approved a charge given by the trial judge to the effect that, if defendants acted honestly and were influenced by proper motives, the plaintiff could not recover.

We ourselves think that a true doctrine was enunciated by the Pennsylvania court in that case; but it fails of proper application in the case before us because here there was no malice and no intention to injure plaintiff. The purpose of defendants as manifested by the only proof adduced was to serve what was deemed to be the legitimate interests of the village—not a selfish one springing out of trade rivalry, jealousy, or revenge.

McKee v. Hughes.

The village of Spring Hill is the location of a large boys' training school; defendant Hughes being one of the principals of the school and mayor of the town. The proof demonstrates that the plaintiff's store was, what one of his own witnesses termed it, a rough house, frequented, as it was, by numbers of drinking and boisterous men, colored and white, and boys at times were seen in the store full of drink. The store appears to have been the rendezvous of plaintiff and a woman, in daytime and at night. Vile communications between the two passed through the local telephone exchange. The woman resorted to the store, and was seen there more than once with plaintiff about midnight, the door being locked. Cursing in loud tones often was heard by the passers-by. Plaintiff himself was often in drink at the store, and was loudly profane. The citizens of the village naturally were desirous of eliminating this condition, and in a public meeting after discussion petition to their village council was resorted to as a peaceable means of relief.

The same principle announced in the Pennsylvania case underlies those cases which involve the exercise of the right of petition where a suit for libel was based upon the contents of the instrument by the person affected thereby.

A number of courts hold that such petitions and all matters embraced therein, if pertinent and relevant, are absolutely privileged. But by the weight of authority they are only qualifiedly privileged; the privilege extending no further than the protection of the signers

McKee v. Hughes.

when they act without malice. Even if the complaint embodied in the petition be untrue, no action can be maintained if it was not maliciously made. *White v. Nicholls*, 3 How., 226, 11 L. Ed. 591; *Kent v. Bongartz*, 15 R. I., 72, 22 Atl., 1023, 2 Am. St. Rep., 870; *Weiman v. Mabee*, 45 Mich., 484, 8 N. W. 71, 40 Am. Rep., 477. But proof of actual malice in respect of such a petition will render it libelous in character, and therefore, of course, an action would lie. *White v. Nicholls*, supra; *Dennehy v. O'Connell*, 66 Conn., 175, 33 Atl., 920, and cases cited above.

Such a petition is presumed not to be the product of the malice of its signers; they ought, in the exercise of such a constitutional privilege, to be presumed to act in the discharge of a social or public duty. The burden of proof to show malice was therefore on the plaintiff, McKee. *White v. Nicholls*, supra; *Ambrosius v. O'Farrell*, 119 Ill. App., 265; *Van Wyck v. Aspinwall*, 17 N. Y., 190. And, as seen, there was no evidence of malice that could have supported a verdict of the jury; and the trial judge was not in error in giving the instruction he did touching the fourth count of the declaration.

It may be that the petitioners misconceived the power of the council under the charter of the village, which granted the council authority to issue privilege licenses, to declare, prevent, or abate nuisances, and to prohibit or suppress disorderly houses of all kinds; further, that under such misconception they petitioned for an abatement of McKee's store as a public nuisance "by revoking his license and closing up his place of

McKee v. Hughes.

business.” But malice or bad faith are not to be imputed to the petitioners because they could not discriminate between the power of summary abatement of a nuisance *per se* and the abatement of a condition such as that shown to have been in existence at McKee’s store by a judicial proceeding. Can it be that ordinary laymen, in the exercise of such a right, may be thus caught on such a fine point of law, to their undoing, as is insisted in this case? The juster view is that these men but advanced the above mode of action as a suggestion for the consideration of the members of the council, deemed by them competent to judge and act as public officials, and that they are not liable if they acted in good faith or without malice. The right of petition guaranteed to the citizen in the bill of rights should not be allowed to become a trap for the petitioner to be sprung by any such hairtrigger of technical law.

In *Harrison v. Bush*, 5 Ellis & Blackb., 344, 119 Eng. Rep., 509, there was involved a memorial signed by defendant along with a large number of the inhabitants of his borough, complaining of the conduct of plaintiff as a justice of the peace, and the court was of opinion no action would lie for libel if the memorialist thought he was addressing an authority who might reasonably be, and was, supposed by him to have the duty and power to act in the premises. Lord Chief Justice Campbell, delivering the opinion, referred to an earlier case of *Fairman v. Ives*, 5 B. & Ald., 642, and to the opinion of Mr. Justice Holroyd therein, and said:

McKee v. Hughes.

“Mr. Justice Holroyd considered that it was enough if the petition had been presented *bona fide*, ‘for the purpose of obtaining redress,’ without considering whether the functionary to whom it was presented had the power to grant redress; and he recognized the case of *Cleaver v. Sarrande*, which carries considerably further the doctrine of the occasion repelling the presumption of malice. The language of Best, J., in *Fairman v. Ives*, 5 B. & Ald., 642, is particularly applicable to the present case: ‘The circumstances under which this letter was sent rendered it a privileged communication. It was an application for the redress of a grievance, made to one of the King’s ministers, who, as the defendant honestly thought, had authority to afford him redress. And this may be done without hazard of an action or prosecution, if the application be made *bona fide* with a view to obtain redress for some injury received, or to prevent or punish some public abuse.’ ”

Satisfied, as we are, that the trial judge properly ruled this case, the writ of *certiorari* is granted, and the judgment of the Court of Civil Appeals is reversed. Judgment here in accord.

Cohn v. Hitt.

SAM COHN v. L. M. HITT *et al.**

(Nashville. December Term, 1915.)

1. **BILLS AND NOTES. Indorsers. Rights of.**

A prior indorser of a note payable to a given bank is not discharged because the maker took the note to a discount broker, engaged him to secure its discount and the broker in the usual course of business indorsed the same, for there was no diversion of the proceeds of the note and the liability of the first indorser was in no way changed. (*Post*, pp. 468, 469.)

Cases cited and approved: Perkins v. Ament, 39 Tenn., 116; Hickerson v. Raiguel, 49 Tenn., 329; Hermitage National Bank v. Carpenter, 131 Tenn., 136.

2. **BILLS AND NOTES. Indorser's liability.**

Negotiable Instruments Law (Laws 1899, ch. 94) sec. 64, declares that a person who places his signature in blank upon an instrument before delivery is liable as an indorser, while section 68 declares that, as respects one another, indorsers are liable *prima facie* in the order in which they indorse, but evidence is admissible to show that as between themselves they have agreed otherwise. Defendant indorsed a note for the accomodation of the maker and thereafter, to secure its discount, complainant also indorsed it. There was no evidence of any agreement whereby complainant should be primarily liable. *Held*, that as there was no diversion of the note, defendant was, both under the statute and at common law, liable to complainant, who was forced to pay the note at maturity. (*Post*, pp. 469-471.)

Act cited and construed: Acts 1889, ch. 94.

Cases cited and approved: McDonald v. Magruder, 3 Pet., 474; In re McCord (D. C.), 174 Fed., 72; Goldman v. Goldberger, 208 Fed., 877; Wilson v. Hendee, 74 N. J. Law, 640; State Bank v. Kahn, 49 Misc. Rep., 500; Harris v. Jones, 23 N. D., 488.

Cases cited and distinguished: Marr v. Johnson, 17 Tenn., 1; Wallace v. Greenlaw, 77 Tenn., 115.

*On the question of character under uniform negotiable instrument law of one who places name on back of note prior to or at time of delivery, see note in 14 L. R. A. (N. S.), 842.

On the question of rights inter se of accommodation parties to commercial paper, see note in 28 L. R. A. (N. S.), 1039.

Cohn v. Hitt.

FROM DAVIDSON

Appeal from the Chancery Court of Davidson County—JOHN ALLISON, Chancellor.

W. R. CHAMBERS and JAMES B. NEWMAN, for appellant.

NATHAN COHN, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This suit was instituted by complainant, Cohn, to recover on a note for \$3,000 against Hitt, as maker, and Gupton as first indorser.

Hitt applied to Cohn to aid him in borrowing \$3,000, asking whether if he, Hitt, should procure his own note to be indorsed by Gupton, Cohn could get it discounted at the Fourth National Bank. After making inquiry as to Gupton's financial standing, Cohn agreed that if Hitt would bring him a note payable to that bank and so indorsed he would, for a fee of \$100 (Cohn being a licensed securities dealer), take the note to that bank and procure it to be discounted. This was done, the bank, in accordance with its custom, requiring Cohn to indorse the note, he being a customer of that bank. It was explained to Cohn by Hitt that both he and Gupton were customers of another national bank, and

Cohn v. Hitt.

it was preferred that the discount be made in the Fourth National Bank so that the lines of credit of Hitt and Gupton in their own bank would not be affected or interfered with. Hitt went to the bank of discount with Cohn, but did not actually see Cohn indorse the note. Cohn received \$2,955, (six per cent. interest being deducted) from the discount clerk, and handed same to Hitt, who paid Cohn his fee.

The note was renewed several times; on the first and every occasion Gupton's name preceded that of Cohn as indorser. When the original note was taken up by the first renewal, Hitt became aware of the actual fact of Cohn's indorsement, though from the outset he presumed that Cohn would be required, in accordance with the course of business, to indorse, and that he would accordingly do so. Gupton did not know of the indorsement of the several instruments by Cohn.

The chancellor decreed in favor of complainant Cohn against both defendants, but Gupton only has appealed.

His first contention is that, since he did not execute the note with the expectation or understanding that Cohn would figure in the transaction, or know that Cohn had done so, the latter could not, by his own act, bring about privity with, or liability on the part of, appellant. We can see no bearing that those facts have upon the rights of the parties. If the note, after the signature of Gupton was obtained, was diverted by being used with a person, or at a bank of discount other than the one agreed upon, there might be room for a contention of nonliability on the part of appellant.

Cohn v. Hitt.

Perkins v. Ament, 2 Head (39 Tenn.), 116; *Hickerson v. Raiguel*, 2 Heisk. (49 Tenn.), 329, 334; *Hermitage National Bank v. Carpenter*, 131 Tenn., 136, 142, 174 S. W. 263. But all that was done was but in furtherance of a discounting at the bank agreed on at the time Gup-ton indorsed the note.

No change in the mere subordinate steps in the plan for raising the money on a note thus indorsed for accommodation will constitute a diversion. If the note effected the substantial purpose for which it was designed by the parties, the indorser, though one for accommodation, cannot defend on the ground that the accommodation was not effected in the precise manner contemplated, where, as here, his interests have not been prejudiced. 1 Daniel, Neg. Inst. (6th Ed.), sec. 793.

The next insistence is that Cohn must be treated as a joint indorser, and therefore, cosurety, so to speak, with appellant; and, though it is conceded that Cohn purchased of the payee bank and took a transfer of the last renewal note at its maturity, it is argued that he is entitled to recover from appellant no more than one half of the amount of the note.

At an early day it was held in this State, following the decision of the Supreme Court of the United States in *McDonald v. Magruder*, 3 Pet., 474, 7 L. Ed., 744, that a prior indorser is liable to every person whose name is placed on the note subsequent to his own, and who has been compelled to pay its amount.

“This is the regular course of business, when notes are indorsed for value; nor is the case altered, as it is contended, where the indorsements are made for the accommodation of the drawer. Where there is no contract between the parties, other than is created by their respective indorsements provided by the act of indorsement, the first indorser gives his name to the maker of the note for the purpose of using it in order to raise the money mentioned on its face; he makes himself responsible for the whole sum, upon the sole credit of the maker. His undertaking is undivided, and he is responsible for the whole.” *Marr v. Johnson*, 9 Yerg. (17 Tenn.), 1; *Wallace v. Greenlaw*, 9 Lea (77 Tenn.), 115.

The Negotiable Instrument Law (Act 1899, ch. 94) recognizes and embodies, and does not change this rule. Thus:

“Sec. 64. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable, as indorser, in accordance with the following rules:

“1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. . . .”

Section 68 defines the rights and liabilities of indorsers *inter sese*:

“As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise.”

Cohn v. Hitt.

This refers to irregular or accommodation indorsers as well as regular indorsers. Without proof of an agreement prior indorsers for accommodation are liable *in solido* to a subsequent indorser who has paid the note. The law fixes their *prima facie* liability in accordance with the order of their names on the paper. *In re McCord* (D. C.), 174 Fed., 72; *Goldman v. Goldberger*, 208 Fed., 877, 126 C. C. A., 35; *Wilson v. Hendee*, 74 N. J. Law, 640, 66 Atl. 413; *State Bank v. Kahn*, 49 Misc. Rep., 500, 98 N. Y. Sup., 858; *Harris v. Jones*, 23 N. D., 488, 136 N. W., 1080. ✓

It is not claimed that there existed any agreement between the indorsers express or implied, tending to change this order of liability. Indeed, the proof and theory of appellant is that he did not even know of the indorsement by Cohn, and the latter expressly stipulated that the note should be delivered to him with the name of Gupton indorsed thereon. *Harris v. Jones*, *supra*.

Other assignments of error are disposed of in a memorandum for decree. Affirmed.

Franklin v. The Duncan.

J. C. FRANKLIN v. THE DUNCAN *et al.***(Nashville. December Term, 1915.)***1. BILLS AND NOTES. Liability of indorser. Stipulation for Attorney's fees.**

An indorser of a note, stipulating for payment of attorney's fees in case of suit, though he be an accommodation indorser, is liable for such fees, especially where he waives demand, protest, and notice. (*Post*, pp. 474, 475.)

Case cited and approved: *Hall v. Pratt*, 103 Ga., 255.

Case cited and distinguished: *Bank of British N. A. v. Ellis* (C. C.), 2 Fed., 44.

2. GUARANTY. Liability of guarantor. Bills and notes. Attorney's fees.

The liability of a guarantor of the payment of a note, stipulating for payment of attorney's fees in case in suit, included the liability of the maker for payment of the fees, especially where the contract of guaranty specified that the guarantor accepted all the provisions of the note. (*Post*, pp. 475, 476.)

Case cited and approved: *Riverside Milling, etc., Co. v. Bank*, 141 Ga., 578.

3. BILLS AND NOTES. Attorney's fees. Necessity of Suit.

The holder of a mortgage note, providing for payment of attorneys' fees if the note was placed "in the hands of an attorney for collection, has to be sued upon, or if litigation arises in the course of its collection," was entitled to have the fees allowed, over objection that its suit was needless, since foreclosure out of court was provided for in the mortgage, where a general creditors' bill was filed against the maker of the note and an injunction granted therein, which operated to enjoin the holder of the note from foreclosing the mortgage except in that cause, and, on the hold-

*On the question of validity of stipulation for attorney's fees see note in L. R. A., 1915B, 928.

Franklin v. The Duncan.

er's intervening to set up its claim by cross-bill, the complainant answered, denying the validity of the mortgage. (*Post*, pp. 476, 477.)

Cases cited and approved: *Clark v. Jones*, 93 Tenn., 639; *Bank v. Woods*, 125 Tenn., 6.

FROM DAVIDSON

Appeal from the Chancery Court of Davidson County
—JOHN ALLISON, Chancellor.

PITTS & McCONNICO and W. N. WRIGHT, for appellants.

SAMUEL N. HARWOOD, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This cause is a general creditors' proceeding to wind up The Duncan, a hotel corporation, and the questions to be determined arise on the claim of the Penn Mutual Life Insurance Company against the insolvent company and Oliver J. Timothy, as guarantor for it.

The Duncan, as maker, executed a mortgage note for \$60,000 to the Life Insurance Company which contained in its body, the following stipulation respecting attorneys' fees:

"It is stipulated that if this note is placed in the hands of an attorney for collection, has to be sued upon, or if litigation arises in the course of its collection, the

Franklin v. The Duncan.

undersigned agrees to pay ten (10) per cent attorneys' fees for such services as may be rendered in connection therewith, the same to be taxed as cost and become a part of any judgment rendered hereon, and said attorneys' fees are secured by said deed of trust."

On the back of the note was the following guaranty, signed by appellant, Timothy, before the delivery of the note to the payee:

"For value received, we, and each of us, jointly and severally, guarantee payment of principal and interest of the within note, as and when the same shall become due, and of any extension thereof in whole or in part, accepting all its provisions, . . . and waiving protest, demand and notice of protest," etc.

The only questions to be treated of are those made by Timothy on his appeal from a decree of the chancellor so far as by it he was held liable for attorneys' fees allowed the payee company.

It is argued that the liability of Timothy is the same in that regard, as if he were a regular endorser in blank.

It is said in 1 Daniel, Neg. Ins. (6th Ed.), 62 (a), that such a stipulation for attorneys' fees becomes a part of the contract of an indorser, and that rule as relates to a regular indorser appears to be sustained by authority. *First Nat. Bank v. Canatsey*, 34 Ind., 149; *Hubbard v. Harrison*, 38 Ind., 323. And certainly the reasons are yet more cogent why this should be true of an indorser who waives demand, protest and notice, thus

Franklin v. The Duncan.

dispensing with any condition precedent to his liability. 3 R. C. L., 1148, and cases cited.

An accommodation indorser is to be held liable for fees so stipulated to be paid. *Hall v. Pratt*, 103 Ga., 255, 29 S. E., 764.

The case of *Bank of British N. A. v. Ellis* (C. C.), 2 Fed., 44, involved the question of the liability of an accommodation indorser for attorneys' fees provided for in the face of a note. It was there said as to the liability of both kinds of indorsers:

"The maker of these notes having agreed to pay an attorney fee to the holder thereof, if the same were not paid without action, in my judgment each subsequent party thereto assumed a like responsibility to such holders, and therefore the plaintiff is entitled to recover such fee from the defendants in this case.

"But I think the defendants are liable to the plaintiff in this action for an attorney fee, even if the stipulation therefor can only be enforced between the immediate parties thereto. The defendants are accommodation indorsers. . . . By their indorsement of them they authorized Gaston, the then holder, to transfer them to the plaintiff, which was done. Every stipulation in them, and every obligation incident thereto, thereby became the stipulation and obligation of the defendants made directly to the plaintiff."

But the appellant in the pending case is a guarantor, and in case of a guaranty, as a general rule, the extent of the liability of the principal debtor, or maker of the

Franklin v. The Duncan.

note, measures the liability of the guarantor. 20 Cyc., 1420; 3 R. C. L., 1155.

Therefore the maker being liable for the fees, the guarantor takes that obligation under the measure of his liability to the holder, for reason even stronger than in the case of an indorser of whatever character.

In *Riverside Milling, etc., Co. v. Bank*, 141 Ga., 578, 81 S. E., 892, the guaranty on the back of the note was to the effect that its signers "guarantee the payment of the same at maturity or at any time thereafter," and it was held that they were liable on the note according to tenor, including the attorneys' fees provided for on the face of the note.

Another contention of appellant is: That by the terms of the guaranty he became guarantor of the payment of principal and interest only, and not of the payment of the attorneys' fees. If we apply the rules of construction applicable to ordinary contracts to the construction of the guaranty, we think it manifest that when the guarantor went further and made use of the phrase "accepting all its provisions" (referring to the provisions of the note), the stipulation as to attorneys' fees was made a part of his express obligation.

But it is said that the insurance company is not entitled to have the fees allowed because its suit on the note was needlessly brought, since a foreclosure out of court was provided for in the mortgage, *Clark v. Jones*, 93 Tenn., 639, 643, 27 S. W., 1009, 42 Am. St. Rep., 931, being cited.

Franklin v. The Duncan.

The general creditors' bill, with the injunction therein granted, operated to enjoin the insurance company from foreclosing the mortgage or trust deed, except in that cause. A foreclosure by means of a trustee's sale out of court could only have been had by leave of the court in that case. After the insurance company intervened to set up its claim by cross-bill, the complainant in the original bill filed an answer, denying the validity of cross-complainant's mortgage, and insisting that that instrument was not authorized by any corporate action of the stockholders, and directors of the corporation, The Duncan. Without meaning to intimate an opinion that but for this last noted fact an allowance of fees would be improper, certainly the insurance company being thus held to support by proof and establish by decree the validity of its lien upon the assets against all other creditors, we think it clear that it has shown good and sufficient reason for not bringing the property to foreclosure sale by the trustee, under the power of sale vested in the trustee by the trust deed. It is therefore entitled to a judgment for attorneys' fees. *Bank v. Woods*, 125 Tenn., 6, 17, 140 S. W., 31.

The decree of the chancellor awarding same is affirmed.

Elledge v. Anderson.

C. J. ELLEDGE v. BEULAH S. ANDERSON *et al.*

(*Nashville*. December Term, 1915.)

1. FRAUDULENT CONVEYANCES. Partial validity of transaction. Right of grantee. Resulting trusts.

Complainant purchased a one-half interest in a stock of goods in violation of the Bulk Sales Law (Laws 1901, ch. 133). Thereafter the seller having died, he acquired the remaining one-half interest on the understanding that creditors' liens should be discharged by the administrator and the seller's widow. The money paid for the second interest could be identified in a bank. *Held* that, as the seller's creditors could have followed the money, and as the whole of the stock was liable for their demands, complainant, who had paid the demands of creditors, was entitled to impress a trust upon such funds, notwithstanding the seller's widow at the time of the sale was mentally incompetent. (*Post*, pp. 481-483.)

Acts cited and construed: Acts 1901, ch. 133.

Cases cited and approved: *Daly v. Drug Co.*, 127 Tenn., 412; *Adams v. Young*, 200 Mass., 588; *Loos v. Wilkinson*, 113 N. Y., 485; *Alley v. Connell*, 40 Tenn., 578.

Case cited and distinguished: *Fecheimer-Kelffer Co. v. Burton*, 128 Tenn., 682-684.

2. EQUITY. Bill. Sufficiency.

Where a bill set out the facts showing complainant to be entitled to relief, and concluded with a general prayer, it is sufficient, though not in so many words stating the theory upon which complainant was entitled to relief. (*Post*, p. 483.)

FROM GILES

Appeal from the Chancery Court of Giles County—
WALTER S. BEARDEN, Chancellor.

*On the question of remedy of creditors where sale is made in violation of bulk sales law, see note in 39 L. R. A. (N. S.), 374.

Elledge v. Anderson.

BEN CHILDERS, for appellants.

J. B. WOODWARD, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court..

This bill was filed to reach \$1,365.83 in a Pulaski bank, claimed by Mrs. Beulah S. Anderson, widow of Ed. F. Anderson. A demurrer was interposed and overruled, and defendants appealed to this court.

The controversy arises in the following manner:

In May, 1910 Ed. F. Anderson, the husband of the defendant, was the owner of a drug store in Pulaski, and on that date he sold a one-half interest therein to the complainant, Elledge, for \$4,000.

Anderson was considerably indebted to mercantile creditors. Of this fact Elledge was unaware; Anderson telling him that the debts amounted to little and promising Elledge to take care of them. No attempt was made by the parties to comply with the provisions of the Bulk Sales Law (chapter 133, Acts of 1901). Neither of them knew of the existence of this statute at the time of the transaction.

After this sale Anderson's creditors brought suits against Elledge to hold him liable to the amount of the value of the stock purchased by him. The suits were founded on the statute referred to. This court held Elledge to be liable to such creditors to the extent of the interest acquired by him in the stock of goods, holding that his purchase of a one-half interest therein was in violation of chapter 133, Acts of 1901. *Daly v.*

Elledge v. Anderson.

Drug Co., 127 Tenn., 412, 155 S. W., 167, Ann. Cas., 1914B, 1101.

In May, 1911, about a year after Elledge had bought this interest in the business, Anderson died. At that time one of Anderson's creditors had recovered judgment against Elledge, and others had sued or were threatening to sue him.

Under these circumstances Elledge made a trade with the administrator of Anderson's estate whereby Elledge acquired the other one-half interest in the business for \$2,750, and as a part of this trade Anderson's administrator and the defendant Mrs. Beulah S. Anderson, the widow, undertook to protect Elledge from further liability on account of Anderson's debts.

The administrator paid off the creditor who had obtained the judgment against Elledge, but later other creditors appeared and brought suits, and, when Elledge sought to hold Mrs. Anderson and the administrator on their aforesaid guaranty, it developed that Mrs. Anderson was of unsound mind and incapable of making a binding contract at the time she signed the paper aforesaid. Elledge brought two suits to hold her liable, and in both of them she was adjudged to have been mentally incapacitated to enter into this contract.

It is conceded that Elledge knew nothing of this condition of her mind when he made such contract.

The \$1,365.83 sought to be reached in this suit is the balance of the sum of money paid to Anderson's administrator by Elledge for Anderson's remaining interest in the stock. There is no question as to the identity of the fund.

Elledge v. Anderson.

It appears that the administrator personally is insolvent. Nothing can be realized from him by Elledge,

Mrs. Anderson claims the \$1,365.83 as her year's support, and insists by her next friend in this case that she is entitled to this sum for this purpose free from the claims of any creditor of her late husband, including the claim of Elledge.

We think the chancellor's decree was correct, and that complainant, Elledge, is entitled to reach this fund. It appears that, notwithstanding the guaranty of protection made to him by the administrator and Mrs. Anderson at the time he purchased Anderson's remaining one-half interest in the firm, Elledge has been sued by Anderson's creditors and has paid more than \$3,500 in judgments against himself on this account.

Anderson and Elledge violated the Bulk Sales Law by the original deal in which Elledge acquired a one-half interest in the stock in 1910. This transaction was declared constructively fraudulent in *Daly v. Drug Company*, 127 Tenn., 412, 155 S. W., 167, Ann. Cas., 1914B, 1101.

Thereafter the entire stock was subject to the demands of these creditors of Anderson's. Elledge was personally liable to the extent of the interest which he had acquired, but all of the stock of goods was liable for Anderson's debts, and subject to attachment.

When Elledge purchased Anderson's interest, thus incumbered, from his administrator, he did so with the understanding that the creditors' lien was to be dis-

Elledge v. Anderson.

charged by the administrator and Mrs. Anderson. Elledge's money really went into the administrator's hands impressed with a trust for the payment of Anderson's creditors. The creditors could undoubtedly have followed this fund.

In *Fecheimer-Keiffer Co. v. Burton*, 128 Tenn., 682, 684, 164 S. W., 1179, 51 L. R. A. (N. S.), 343, considering a sale had in violation of the Act of 1901, it was said:

“It seems clear, since the sale was only fraudulent in law, . . . that the purchasers are entitled to stand in the place of the creditors whose demands against their vendor were thus paid by the purchase money notes, or the proceeds thereof. Those whose purchase of property has been under such a statute denounced as constructively fraudulent, and avoided by creditors of the seller, may stand in the place of other creditors whose demands have been thus paid.”

For this the court cited *Adams v. Young*, 200 Mass., 588, 86 N. E., 942, *Loos v. Wilkinson*, 113 N. Y., 485, 21 N. E., 392, 4 L. R. A., 353, 10 Am. St. Rep., 495, and *Alley v. Connell*, 40 Tenn. (3 Head), 578, which authorities fully sustain the proposition.

As we have pointed out, Elledge paid off Anderson's creditors to the extent of \$3,500, and under the authorities above he became subrogated to the rights of these creditors against Anderson's interest in the stock of goods. These creditors had a lien as a result of the statute, on Anderson's interest and Elledge's interest—the entire stock. When Anderson paid them

Elledge v. Anderson.

he acquired their lien, including their lien on Anderson's interest.

What, then, became of Anderson's interest? Where was it? It was represented by the fund Elledge had paid to the Administrator. This payment was made on the faith of the bond executed by the administrator and by Mrs. Anderson that they would save Elledge harmless from the demands of Anderson's creditors.

Said sum of money so paid by Elledge, being the proceeds of property charged by the statute with a trust in favor of Anderson's creditors, could have been followed and subjected by the creditors in the administrator's hands. When Elledge paid the creditors he became subrogated to this right of theirs. He has traced part of the fund and found it in a Pulaski Bank, and we think he is entitled to hold it.

The entire theory of the defendant rests on the idea that Elledge was merely a general creditor of Anderson as to the sums in which he was mulcted for Anderson's mercantile debts, and it is accordingly urged his claim could not have priority over the widow's claim for a year's support. The argument for the widow entirely overlooks the right of Elledge to be substituted to the rights and remedies of the creditors paid by him, and is for this reason unsound.

Complainant's bill states the facts fully. While it does not in so many words present the theory upon which we have concluded the bill should be maintained, under the prayer for general relief the court thinks it proper to sustain the bill for the reasons herein stated.

Decree of the chancellor affirmed with costs.

Minton v. Wilkerson.

G. B. MINTON *v.* J. MORGAN WILKERSON *et al*

(Nashville. December Term, 1915.)

1. EQUITY. Practice. Special issues.

Generally, when in an equity case there are several issues of fact submitted to a jury, they must find on all or none, and a verdict on one or more is not valid. (*Post*, pp. 486, 487.)

Cases cited and approved: *Cooper v. Maddox*, 34 Tenn., 135; *Berry v. Wallen*, 1 Tenn., 186; *Auncelme v. Auncelme*, Cro. Jac., 31.

Code cited and construed: Sec. 4240 (S.).

2. EQUITY. Practice. Special issues.

In a suit to recover complainant's alleged interest in the estate of his wife, where he attacked the validity of his release of the same, and the jury, to which special issues of fact were submitted, found in favor of the validity of the release, but failed to find on issues as to separation of complainant and his wife presented by defendants, the failure is immaterial and will not deprive defendants of a decree in their favor. (*Post*, pp. 487, 488.)

Cases cited and approved: *Sears v. Sears*, 45 Tex., 557; *Coons v. Lain* (Tex. Cir. App.), 168 S. W., 981; *Brown v. Milwaukee, etc., Co.*, 148 Wis., 98; *Columbia Power Co. v. City Mills Co.*, 114 Ga., 588.

3. APPEAL AND ERROR. Review. Findings.

Where complainant did not move for a new trial and preserve the evidence in a bill of exceptions, the finding of the jury against him on issues submitted in an equity case must be deemed by the appellate court as warranted by the evidence. (*Post*, p. 488.)

Case cited and approved: *Scruggs v. Heiskell*, 95 Tenn., 455.

Minton v. Wilkerson.

FROM DAVIDSON

Error to the Chancery Court of Davidson County—
JNO. ALLISON, Chancellor.

W. D. COVINGTON and H. A. LUCK, for complainant.

SAMUEL N. HARWOOD and FRANK P. BOND, for defend-
ants.

MR. JUSTICE WILLIAMS delivered the opinion of the
Court.

The bill of complaint was filed by Minton by next friend, against the administrator of the estate of complainant's wife, to recover the sum of \$4,000 left by that decedent, basing the claim on marital right. The bill set forth that Minton was of such unsound mind as to be incapable of transacting business; that three days after the death of complainant's wife, defendant Wilkerson, her brother, accompanied by an attorney, visited him while he was confined to his bed as a helpless invalid; that his mind, by reason of sickness and a constant use of drugs, was weakened so that he was incapable of understanding the nature of the transaction; that he was caused by these visitors to execute a release of his interest in the estate of his wife, which release was impeached for fraud and prayed to be annulled as void.

The defendants answered, denying that the release was fraudulent, and setting forth acts of violence to, and of ill treatment and personal abuse by complainant of, his wife in her lifetime, which had caused her to

Minton v. Wilkerson.

leave and live separate from him, and that the fund sought to be recovered was acquired after such separation, which was not followed by a reunion. The defense was pitched on the provisions of Code (Shannon) sec. 4240, as construed in *Cooper v. Maddox*, 2 Sneed (34 Tenn.), 135, 149.

The case was tried before a jury on issues of fact submitted.

Complainant submitted five issues, all of which related to the validity of the release, and in responses made to all of them the jury found against complainant and in favor of the validity of the release.

The defendants submitted eight issues, relating to a separation and the cause thereof, and to the dates when the fund was acquired. To some of these issues of the defendants the jury replied, "We cannot agree."

The complainant moved for a decree *non obstante veredicto*, which motion was denied, and then that a mistrial be entered, which motion was also refused.

The defendants moved for a decree in their favor upon the verdict, which the chancellor declined, and they have sued out writs of error and *certiorari* to review the rulings of the chancellor.

A basic contention of the complainant is that because the jury reported their disagreement on certain of defendants' issues, the verdict was vitiated, and no relief in behalf of defendants can be predicated on it. In our view the solution of this question is decisive of the case.

The general rule undoubtedly is that when in an equity case there are several issues of fact submitted to

Minton v. Wilkerson.

a jury, they must find all or none, and may not find on one or more and disagree on another and the verdict be valid. *Berry v. Wallen*, 1 Overton (1 Tenn.), 186; *Auncelme v. Auncelme*, Cro. Jac., 31; 11 Enc. Pl. & Pr., 710.

However, the failure of the jury in an equity case to agree upon or respond to an issue which is *ab initio* immaterial (38 Cyc., 1924), or which becomes immaterial in view of the finding on other issues (independent of and not in conflict with the one unresponded to), does not vitiate the verdict, when taken as a whole, the findings are sufficiently comprehensive to support a decree which properly disposes of the whole case. *Sears v. Sears*, 45 Tex., 557; *Coons v. Lain* (Tex. Civ. App.), 168 S. W., 981; *Brown v. Milwaukee, etc., Co.*, 148 Wis., 98, 133 N. W., 589; *Columbus Power Co. v. City Mills Co.*, 114 Ga., 558, 40 S. E., 800.

The case last cited, an equitable action in relation to a backflow of water, was submitted to a jury upon special issues, upon which judgment was rendered for defendant. Two issues were presented by plaintiff respecting the natural and present head and fall on the property of defendant, to each of which the jury answered, "We do not know." The defendant submitted an issue as to its prescriptive right to backflow the lands, which was found in its favor. The court, on appeal, held that:

"The answer with respect to the prescriptive right of the Mills Company was conclusive of the whole case, and sufficient, in and of itself, to defeat the plaintiff's action."

Minton v. Wilkerson.

—and that the other issues were rendered immaterial.

So, in the case under consideration, it may be admitted that defendants' issues, not agreed on or properly replied to, would have been material had the jury not held against complainant on the issues submitted as to the validity of the release. But any cause of action, when or if conceded to exist, was found to have been satisfied and released, and the essential foundation for a decree on the merits was afforded by the findings. The issues as to that may well be termed the paramount issues in such case. The other issues became immaterial, if the issues as to payment or release were based on adequate proof.

The complainant did not move for a new trial and preserve the evidence in a bill of exceptions, and therefore the finding of the jury on such issues must be deemed, by us on appeal, to have been justified by the evidence. *Scruggs v. Heiskell*, 95 Tenn., 455, 32 S. W., 386.

The chancellor was in error in not responding to defendants' motion by decreeing in their favor on the findings. Reversed, with remand to the lower court for proceedings in accord herewith.

RICHMOND TYPE & ELECTROTYPE FOUNDRY v. GEORGE
CARTER *et al.*

(*Nashville*. December Term, 1915.)

1. **REPLEVIN. Actions. Right to maintain.**

A mere equitable title will not support replevin. (*Post*, pp. 491-493.)

Cases cited and approved: Clark v. Jones, 93 Tenn., 641; Graham v. McCampbell, 19 Tenn., 52; Cleveland v. Martin, 39 Tenn., 128; Roberts v. Francis, 49 Tenn., 127; Anthony v. Smith, 28 Tenn., 511; Thompson v. Pyland, 40 Tenn., 537; Crain v. Paine, 4 Cush. (Mass.), 483; Baker v. Seavey, 163 Mass, 522; Ramsdell v. Tewksbury, 73 Me., 197; Smith's Ex'rs v. Mabry, 17 Tenn., 313; Rice v. Crow, 53 Tenn., 28.

2. **CHATTEL MORTGAGES. Replevin. Equitable assignments.**

Where notes secured by a chattel mortgage were indorsed, but the mortgage was not assigned, the notes, while carrying with them the equitable title to the mortgage, did not carry such title as would warrant the holder in maintaining replevin in his own name for the mortgaged chattels. (*Post*, pp. 491-493.)

3. **APPEAL AND ERROR. Record. Necessity of Bill of Exceptions.**

In the absence of an assignment of error and a bill of exceptions presenting the question of the refusal of an amendment, the matter cannot be reviewed, though the action appeared in the motion for new trial; that being a mere pleading and not evidence of what occurred on the trial. (*Post*, pp. 493, 494.)

Cases cited and approved: Sherman v. State, 125 Tenn. 19; De Liguero & Crozier v. Munson, 58 Tenn., 18; Cormick v. Richards, 71 Tenn., 1.

FROM DAVIDSON

Richmond Type & Electrotpe Foundry v. Carter.

Appeal from the Circuit Court of Davidson County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—G. N. TILLMAN, Special Judge.

GARNETT S. ANDREWS, for plaintiff.

A. F. WHITMAN, for defendants.

MR. JUSTICE GREEN delivered the opinion of the Court.

This is an action of replevin brought to recover certain printing machinery from George Carter and Mike Holloran, deputy sheriffs of Davidson county. The officers levied on the said equipment under attachment, and the plaintiff brought this suit, claiming to be entitled to the possession thereof. There was a judgment for defendants below. The court of civil appeals reversed this judgment, and the defendants have filed a petition for *certiorari*.

It appears that the equipment of a publishing company in Nashville, known as the Daily Record Company, was sold to R. H. Yancey, Jr. Yancey executed purchase-money notes for the said equipment, and to secure the payment of these notes likewise executed a mortgage on the equipment to the Daily Record Company. It seems that the Daily Record Company was indebted to the Richmond Type & Electrotpe Company, the plaintiff in this suit, and transferred the Yancey notes to the plaintiff to secure its indebtedness to plaintiff. There was no assignment by the Daily Record

Richmond Type & Electrotype Foundry v. Carter.

Company to the plaintiff of the mortgage made to the Daily Record Company by Yancey to secure the payment of these notes.

An attachment was levied on this printing outfit by certain creditors of the Daily Record Company, and under this attachment the defendant officers had possession of the property when it was replevined herein by the plaintiff.

The principal defense is that, inasmuch as no assignment of the mortgage securing these Yancey notes was made to the plaintiff, plaintiff never became vested with such a property right in the machinery as to enable it to maintain with reference thereto an action of replevin at law. The Yancey notes were transferred by the Daily Record Company to the plaintiff, and it is insisted for plaintiff that such transfer of the notes also effected a transfer of the mortgage securing the notes and conferred upon the plaintiff sufficient title to the property to enable it to maintain replevin as stated above. The circuit judge sustained the contention of the defendants. The court of civil appeals reversed this action and rendered judgment for the plaintiff.

The court of civil appeals based its action on the case of *Clark v. Jones*, 93 Tenn., 641, 27 S. W., 1009, 42 Am. St. Rep., 931, in which it was held that the transfer of notes secured by a mortgage carried with it the lien created by the mortgage. *Clark v. Jones* cited *Graham v. McCampbell*, 19 Tenn. (Meigs), 52, 33 Am. Dec., 126; *Cleveland v. Martin*, 39 Tenn. (2 Head), 128; *Roberts v. Francis*, 49 Tenn. (2 Heisk.), 127; *Anthony v. Smith*,

Richmond Type & Electrotype Foundry v. Carter.

28 Tenn. (9 Humph.), 511; *Thompson v. Pyland*, 40 Tenn. (3 Head), 537.

Clark v. Jones and other cases, *supra*, were all cases in which the transferees of notes secured by mortgage or other liens upon land came into equity and sought to enforce their rights upon the land. In these cases it was held that the transfer of such notes so secured carried the liens upon the land without formal assignment of the instrument reserving the liens. This is true in equity and in courts of equity. Such transferees are entitled to enforce their liens so acquired.

This, however, is a suit at law, and the question is whether the plaintiff has such title to or property in the mortgaged chattels as to permit an action of replevin for the recovery thereof to be brought in its name.

An assignee of mortgage notes to whom no assignment of the mortgage itself is made becomes merely the equitable owner of the mortgage and ordinarily cannot maintain in his own name an action at law respecting the property.

“An assignee of mortgage notes is, however, the mere equitable owner of the mortgage, and such an equitable assignment will not entitle him to maintain an action at law for conversion of the property; such an action can be maintained only in the name of the mortgagee.” 5 R. C. L., 442.

See *Crain v. Paine*, 4 Cush. (Mass.), 483, 50 Am. Dec., 807; *Baker v. Seavey*, 163 Mass., 522, 40 N. E.,

Richmond Type & Electrotpe Foundry v. Carter.

863, 47 Am. St. Rep., 475; *Ramsdell v. Tewksbury*, 73 Me., 197; Jones Chattel Mortgages, sec. 503.

In *Smith's Ex'rs v. Mabry*, 17 Tenn. (9 Yerg.), 313, this court held that an equitable title to slaves would not support an action of detinue.

The same general or special property is requisite for a plaintiff to maintain either detinue or replevin. Caruther's History of a Lawsuit (3d Ed.), pp. 134, 135. This court has likewise held that the equitable owners of property could not maintain a suit in replevin. *Rice v. Crow*, 53 Tenn. (6 Heisk.), 28.

So we must conclude that the court of civil appeals erroneously held that the plaintiff could maintain this action of replevin in its own name.

It appears from the motion for a new trial made below that the plaintiff sought to amend his warrant in the circuit court so as to bring the suit in the name of the Daily Record Company for the use of plaintiff. This amendment was not allowed by the circuit judge, however. Had the suit been so brought, it might have been maintained. The refusal of the circuit judge to permit this amendment is not made the basis of any assignment of error in this court by the plaintiff, and indeed this action of the circuit judge only appears in the motion for a new trial, not in the bill of exceptions. As we have pointed out in *Sherman v. State*, 125 Tenn., 19, 140 S. W., 209, a motion for a new trial is merely a pleading and cannot be looked to as evidence of what occurred on the trial. So the plaintiff is not in position to

Richmond Type & Electrotype Foundry v. Carter.

obtain any benefit of the refusal of the circuit judge to permit the amendment sought to be made there.

The plaintiff insists that an assignment of the mortgage was effected by a delivery of the same to it, and that no formal writing was necessary for this proposition. Plaintiff refers to *De Liquero & Crozier v. Munson*, 58 Tenn. (11 Heisk.), 18, and *Cornick v. Richards*, 71 Tenn. (3 Lea), 1. One difficulty is that the record does not even show delivery of the mortgage to the plaintiff. The case was tried on an agreed statement, and the mortgage appears in the record as an exhibit to this statement. The record does not show who brought forth the mortgage, however, nor is there anything to indicate that a delivery of this paper had been made to the plaintiff.

Other authorities cited by the plaintiff relate to cases where the mortgage as well as the notes secured thereby had been assigned, and consequently are not in point here.

The writ of *certiorari* is, accordingly, granted, the judgment of the court of civil appeals reversed, and the judgment of the circuit court affirmed.

Nat. Life & Acc. Ins. Co. v. Jordan.

NATIONAL LIFE & ACCIDENT INSURANCE COMPANY v.
GEORGE JORDAN.

(*Nashville*. December Term, 1915.)

JURY. Jury trial. Demand.

Shannon's Code, sec. 4611 (Acts 1875, ch. 4, as amended by Acts 1889, ch. 220), declares that, when any civil suit is triable by jury, either party desiring a jury shall demand the same in his first pleading, tendering an issue triable by jury, or he shall call for the same on the first day of any trial term, and have an entry on the docket that he calls for a jury, and, unless such demand and entry is made, the court shall try the case without a jury. Sections 4616 and 4673 require the clerk to keep two dockets, styled, respectively, "nonjury" and "jury" dockets. Three days before the first day of the term defendant's counsel, by an entry in the clerk's docket, demanded a jury trial. *Held* that, as the amendatory act provided for demand other than with the first pleadings, and as the court cannot in a case triable by jury deny that right, the demand was sufficient, although not made to the court on the first day of the term.

Acts cited and construed: Acts 1875, ch. 4; Acts 1889, ch. 220.

Cases cited and approved: Railroad v. Martin, 85 Tenn., 134; Railroad v. Timmons, 116 Tenn., 29.

Codes cited and construed: Secs. 4611, 4612, 4616, 4673 (S.).

FROM DAVIDSON

Appeal from the Circuit Court of Davidson County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—A. G. RUTHERFORD, Judge.

Nat. Life & Acc. Ins. Co. v. Jordan.

R. E. BLAKE, for plaintiff in *certiorari*.

G. S. MOORE, for defendant in *certiorari*.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

The action originated before a justice of the peace. It was a suit on two accident policies. The company was cast, and judgment went against it for \$72.50. On its appeal to the circuit court there was judgment against it for the amount of \$35. Its motion for a new trial in that court being overruled, it appealed to the court of civil appeals, where the judgment was affirmed, and the case is before us on petition for *certiorari*.

The single question is whether the company made a call or demand for a jury trial in the circuit court in the mode and at the time prescribed by our statutes regulating the practice in such matters.

The first day of the term of the circuit court to which the case was appealed was February 1, 1915. The case was tried by the circuit judge without a jury during that term. Prior to the beginning of that term, to wit, on January 28, 1915, the attorney for the company, by an entry on the clerk's trial docket, where it had caused the style of the case to be set down in writing, made demand for a jury trial of the cause in these words:

"The defendant demands a jury to try this case February 1, 1915.

"R. E. BLAKE, Attorney for defendant."

This demand was on the clerk's jury trial docket on the first day of the term to which the case was appealed,

and at which it was tried, and the demand was made in accord with the practice of the attorneys who were accustomed to demand jury trials in causes pending in that court. Nevertheless his honor the circuit judge was of the opinion that the practice was not in accordance with the law, and he accordingly sustained the plaintiff's motion to remand the case to the nonjury docket; the ground of his action being that the record failed affirmatively to show that a demand for a jury trial was made by defendant on the first day of the term to which the case was appealed. The order reciting the action of the court vacates an order entered on page 363 of Minute Book 2 demanding a jury. We think it is evident from what is shown by this order that the clerk of the court, in accord with the former practice therein, had regarded what appeared upon his jury trial docket as a sufficient demand for a jury trial, and had made a minute entry on the first day of the term reciting, in substance, that a jury trial had been demanded in the cause. Our statutes (sections 4616 and 4673, Shannon's Code) require the clerk to keep two trial dockets, styled, respectively, "nonjury" and "jury" dockets, upon which he is required to place the cases respectively designated to be tried without a jury, or by a jury. The sections of Shannon's Code relating to the matter in hand are numbered 4611 to 4616, inclusive.

The foregoing sections are compiled from two acts of our general assembly; the first is chapter 4, Acts of

1875; the second is chapter 220, Acts of 1889. The act last mentioned is an amendment of the original act, and was, no doubt, passed in order to simplify the practice, and to avoid misapprehension of the exact meaning of the original act, as it had been construed in *Railroad v. Martin*, 85 Tenn. (1 Pick.), 134, 2 S. W., 381. The amendatory act puts the two classes of cases mentioned in section 1 of the act of 1875 on much the same footing. It did not repeal the right of a party to a suit originating in a court of record to demand a jury in his first pleading tendering an issue triable by jury. It left that provision standing as the same existed under the original act; but the amendatory act added to the existing mode in such cases another mode, and the two modes of making the demand or call are made apparent by an examination of section 4611, Shannon's Code. The second mode named in that section was not available to a party in that class of cases under the original act. The amendatory act, by its express terms, applies to both classes of cases covered by section 1 of the original act, and the mode of calling for or demanding a jury which the amendatory act prescribes may be pursued with equal success in either class of cases. This mode, common to each class of cases is laid down in the amendatory act with fair exactness. At only one point is there ambiguity. The word "call" and the word "demand," as used in the first section of the amendatory act, are synonymous in meaning. The ambiguity lies in the absence of express words prescribing of whom the call or demand shall be made; but this am-

biguity, when the history and purpose of the legislation is considered, may be easily cleared away. The prime purpose of the legislation was twofold: First, to expedite the business of the courts by dividing trials into jury and nonjury trials, and providing for jury and nonjury dockets; second, to prescribe some definite method by which it might become known to the courts and to the clerks which of the causes pending at the beginning of the term, and triable by jury were intended by the parties to be so tried, and, on the other hand, which of such cases the parties intended to submit to the judgment of the court without the intervention of a jury, and to accomplish these two purposes of the statute the jury and nonjury trial dockets were provided for, to be kept by the clerk of the court, and further to accomplish these purposes we find in the first section of the act of 1875 the declaration that:

“A failure to demand a jury as aforesaid shall be deemed and held conclusively an agreement of the parties to submit all issues and questions of fact to the decision of the judge without a jury.”

Under the act of 1875 the parties were allowed the first three days of the trial term within which the demand might be made, but that provision was changed to one particular day by the amendatory act, under which the parties are allowed the first day of any term at which the suit stands for trial to make demand for a jury trial. The purpose of the amendatory act was that on the particular day designated by it there should be spread on the clerk's jury trial docket, the style of each

case, and the demand or call of the party thereto who desired a trial of that cause by a jury; and it matters not, as we think, whether the entries aforesaid, upon the clerk's trial docket, be made before the first day of any term at which the case stands for trial, or on the first day of such a term. In either case the entry of the style of the cause and the demand for a jury trial thereof would suffice. In crowded centers of population, where the volume of business is great, a construction of the legislation which would require every demand for a jury trial to be made on the first day of the term by an entry of the style of the cause, and the demand, on the clerk's trial docket, on that particular day, would be exceedingly inconvenient, and would not serve, in our opinion to forward any purpose of the legislation. We see no purpose in the legislation which would be advanced by requiring the call or demand to be made in open court, and upon the presiding judge thereof, on the first day of any term at which the cause stands for trial. Neither of the acts expressly so provides, and nothing in either of them warrants us in importing into them such a meaning. Such a construction would impose upon the judge useless labor, and result in an unprofitable consumption of his time.

We think the call or demand which was made in the present case on January 28th, and which was recorded on the clerk's jury trial docket, and stood thereon open to the examination of the judge of the court and of the bar alike, on the first day of the term to which the cause was appealed, and that on which it stood for trial, and

was tried, was a sufficient compliance with section 4612, Shannon's Code, and the act of 1875, as amended by the act of 1889. The demand made in this case was a continuous one for every moment of the first day of the term. No mere direction of the attention of the circuit judge to the demand would have advanced any purpose of the statute. There was no discretion of the judge to grant or refuse it, if it were sufficient in form and substance as a compliance with the mode laid down in the statute. The warrant or right of a party to a jury trial in a cause triable by jury exists under the constitution of the State and under the federal constitution. The judge of the court was without power to deny such a right if it was demanded in the mode laid down in the statute and at the time specified. To be sure, if a party has made an abortive effort to make a demand for a jury trial, and in response thereto the cause has been set down on the clerk's jury trial docket, the opposite party may move to remand the cause to the nonjury docket, and this motion the court has power, and is under the duty, to grant if made in time. Such a motion may, of course, be made by the opposite party and disposed of by the court after the first day of any term at which the cause stands for trial. Such a motion was allowed in *Railroad v. Timmons*, 116 Tenn. (8 Cates), 29, 91, S. W., 1116, and in that case the legislation under consideration received, in substance, the same construction given to it herein.

The court of Civil Appeals, in sustaining the action of the trial judge, seems to have followed the reasoning

Nat. Life & Acc. Ins. Co. v. Jordan.

of this court in *Railroad v. Martin*, 85 Tenn. (1 Pick.) 134, 2 S. W., 381. Judges WILSON and MOORE, however, dissented.

Railroad v. Martin, supra, was decided prior to the passage of the amendatory act; but *Railroad v. Timmons*, supra, was decided after that act, and the construction of the act in that case should have been followed by the court of civil appeals.

It results that the writ is granted, the judgment of the court of civil appeals is reversed, and the cause is remanded to the circuit court of Davidson county for further proceedings. A copy of this opinion will go down with the *procedendo* on the remand.

Louisville & N. R. Co. v. McKay & Morgan.

LOUISVILLE & N. R. Co. v. MCKAY & MORGAN.

(*Nashville*. December Term, 1915.)

1. CARRIERS. Carriage of goods. Bill of lading. Delivery.

A carrier is only authorized to deliver goods upon presentation of the genuine bill of lading, and any delivery made with that bill of lading outstanding is at its peril, and renders it liable to the holder of the genuine bill. (*Post*, p. 507.)

Cases cited and approved: *Bank v. Railroad*, 128 Tenn., 530; *Railroad v. Fidelity & Guaranty Co.*, 125 Tenn., 674; *Bigham v. Madison*, 103 Tenn., 358; *Callis v. Cogbill*, 77 Tenn., 138.

2. CARRIERS. Carriage of goods. Relief. Surprise and Imposition.

Complainant railroad, which delivered a carload of beans to defendant upon his innocent presentation of a false bill of lading made by his principal, after recovery by the holder of the true bill, might recover against the defendant, on the ground that a party's innocent misrepresentation of a material fact by mistake upon which either party is induced to act is ground for relief in equity as a willful and false assertion, which in either case operates as a surprise and imposition. (*Post*, pp. 507, 508.)

Cases cited and approved: *Phillips v. Hollister*, 42 Tenn., 269; *Bankhead v. Alloway*, 46 Tenn., 56; *Lewis v. McLemore*, 18 Tenn., 206.

3. CARRIERS. Carriage of goods. Relief. Loss between innocent parties.

Complainant in such case might recover on the principle that, where one of two innocent parties must suffer, that one by whose act the loss was occasioned must bear it. (*Post*, p. 508.)

Case cited and approved: *Bank v. Railroad*, 128 Tenn., 530.

Louisville & N. R. Co. v. McKay & Morgan.

4. PRINCIPAL AND AGENT. Liability of agent of undisclosed principal.

Agent innocently presenting a false bill of lading made by his principal, receiving goods from complainant carrier, and remitting proceeds to his principal, without disclosing his agency to the complainant, *held* personally liable for the goods received. (*Post*, pp. 508, 509.)

Cases cited and approved: *Siler v. Perkins*, 126 Tenn., 380; *Fargason v. Ball*, 128 Tenn., 137; *Roach v. Turk*, 56 Tenn., 708.

5. CARRIERS. Delivery of goods. Fraud. Action.

Where a carrier through mistake or fraud has been induced to deliver goods to the wrong person, it may maintain an action against such person for damages. (*Post*, pp. 509, 510.)

Cases cited and approved: *Sword v. Young*, 89 Tenn., 128; *Walker v. L. & N. R. R. Co.*, 111 Ala., 233.

FROM DAVIDSON

Appeal from the Chancery Court of Davidson County
—JOHN ALLISON, Chancellor.

HUME & CORNELIUS, for appellants.

F. M. BASS and KEEBLE & SEAY, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

This bill was filed by the Louisville & Nashville Railroad Company to recover from the defendants the value of a car of beans delivered by the complainant to defendants on the faith of a bill of lading which after-

Louisville & N. R. Co. v. McKay & Morgan.

wards turned out to be a forgery. From a decree in favor of complainant, defendants have appealed to this court.

The defendants were merchandise brokers in Nashville, correspondents of the firm of Botsford & Barrett, commission merchants of Detroit. The defendants ordered a car of beans from Botsford & Barrett, and the latter procured a shipment of such car to be made by the Farmers' Grain & Hay Company of Applegate, Michigan. The shipment was made by the Farmers' Grain & Hay Company to their own order at Nashville, Tenn., with directions to notify McKay & Morgan.

The usual order notify bill of lading was issued to the Farmers' Grain & Hay Company by the agent of the Pere Marquette Railroad Company at Applegate, Mich., and the shipper attached this bill of lading to a draft made upon Botsford & Barrett at Detroit. This draft was forwarded through the shipper's local bank to a bank in Detroit and presented to Botsford & Barrett, but it was not paid. After being held in Detroit for some time, the draft was returned to the shipper at Applegate, Mich., together with the original bill of lading thereto attached.

Meanwhile the car of beans had been forwarded to Nashville. Botsford & Barrett made up a spurious bill of lading which was attached to a draft on McKay & Morgan and sent on to Nashville for collection. McKay & Morgan refused to pay the draft because it had not been authorized by them. Some telegraphic correspondence was had between the parties in Nash-

Louisville & N. R. Co. v. McKay & Morgan.

ville and the parties in Detroit, and the Nashville bank was directed to release the bill of lading to McKay & Morgan without payment of the draft.

McKay & Morgan took this forged bill of lading to the Louisville & Nashville Railroad Company in Nashville, and upon presentation thereof received the car of beans. They sold the beans to their customers in Nashville and remitted the proceeds to Botsford & Barrett at Detroit.

McKay & Morgan acted innocently in the matter, believing that their bill of lading was genuine. It likewise appears that the Louisville & Nashville Railroad Company thought the bill of lading was genuine, and there is no question but that the railroad company and the defendants both acted in perfect good faith.

As stated above, the draft to which the genuine bill of lading was attached being finally returned to the Farmers' Grain & Hay Company at Applegate, Michigan, that company then undertook to trace the car which had been shipped to Nashville. Upon investigation the facts stated above as to the delivery of the car were ascertained by the shipper at Applegate.

The shipper then brought suit against the Louisville & Nashville Railroad Company in the federal court at Detroit for the value of the contents of the car, and obtained judgment against the railroad company, which the latter paid, taking an assignment of the claim of the shipper to the beans. The suit in Detroit was really settled by the complainant railroad company without any particular fight; it considering that resistance was

Louisville & N. R. Co. v. McKay & Morgan.

useless. The complainant, however, notified the defendants of the claim made against it by the shipper and invited defendants to undertake a settlement of the matter.

Upon the foregoing state of facts the chancellor held that the complainant was entitled to relief and we think his conclusion was correct.

In so far as the shipper's claim was concerned, the complainant railroad company had no defense. The company was only authorized to deliver this car upon presentation of the genuine bill of lading, and any delivery made with that bill of lading outstanding was at the peril of the company. *Bank v. Railroad*, 128 Tenn., 530, 161 S. W., 1144; *Railroad v. Fidelity & Guaranty Co.*, 125 Tenn., 674, 148 S. W., 671, and cases cited.

We think no question can be made upon the propriety of the action of complainant in settling the suit of the shipper without contest. Obviously no valid defense could have been interposed to this suit. *Bigham v. Madison*, 103 Tenn., 358, 52 S. W., 1074, 47 L. R. A., 267; *Callis v. Cogbill*, 9 Lea, 138.

The right of complainant to recover against the defendants in this case may be rested upon well-settled principles of equity jurisprudence.

If a party innocently misrepresents a material fact by mistake upon which another party is induced to act, it is as conclusive a ground for relief in equity as a willful and false assertion; for in either case it operates as a surprise and imposition on the other party. In such case the party must answer for his misrepresenta-

Louisville & N. R. Co. v. McKay & Morgan.

tions, even though innocently made. *Phillips v. Hollister*, 42 Tenn., (2 Cold.), 269; *Bankhead v. Alloway*, 46 Tenn. (6 Cold.), 56, 75; *Lewis v. McLemore*, 18 Tenn. (10 Yerg.), 206.

It cannot be doubted that the defendants would be liable in this case if they had intentionally procured this consignment upon the forged bill of lading, and, under the authorities above cited, it makes no difference that they acted innocently in the matter.

The suit of complainant is likewise maintainable on the principle that, where one of two innocent parties must suffer, he by whose act the loss was occasioned must bear it. This rule is of frequent application in controversies with reference to unauthorized deliveries by carriers. *Bank v. Railroad*, 128 Tenn., 530, 161 S. W., 1144, and cases cited.

Defendants did not divulge the fact that they were acting as agents for others when they procured this car of beans from the carrier, and must therefore be held as principals in the transaction. Although they were mere selling agents for Botsford & Barrett and turned over the entire contents of the car to certain Nashville merchants, they did not disclose their principals in their dealings with the carrier, and must be held personally liable. *Siler v. Perkins*, 126 Tenn., 380, 149 S. W., 1060, 47 L. R. A. (N. S.), 232, and authorities cited.

Quite an able argument is made in behalf of defendants founded on the cases of *Fargason v. Ball*, 128 Tenn., 137, 159 S. W., 221, 50 L. R. A., (N. S.), 51, and *Roach v. Turk*, 9 Heisk., 708, 24 Am. Rep., 360.

In these cases it was held that cotton factors at Memphis who received cotton from ostensible owners and sold the cotton and turned the proceeds over to such ostensible owners could not be held as for a conversion by parties in other States who really owned or had mortgage liens on the cotton.

In *Fargason v. Ball*, supra, it is recognized that the rule announced in these cases is in conflict with considerable authority, but the court found it necessary to follow *Roach v. Turk*, supra, because of the peculiar geographical location of some of our cities, and the fact that the bulk of their business is transacted in other States. The cotton business at Memphis particularly has attained great proportions and has been conducted on the faith of the law as stated in *Roach v. Turk*, supra, and the court was unwilling to adopt a different rule at this late date.

In neither of the cotton factor cases, however did the factor take any active part in procuring the merchandise from the owner's agent. There was no misrepresentation by the factor, *albeit* innocently made. Possession was not obtained upon the faith of any forged document presented by the factor, and this case is therefore readily distinguishable from *Fargason v. Ball*, and *Roach v. Turk*, on its facts.

We do not think it desirable to extend the doctrine of *Roach v. Turk*, and *Fargason v. Ball*, to cover cases involving such circumstances as are here presented.

The general rule is that, where a carrier has through mistake or fraud been induced to deliver goods to the

Louisville & N. R. Co. v. McKay & Morgan

wrong person, he may maintain action against such person for damages. *Sword v. Young*, 89 Tenn., 128, 14 S. W., 481, 604; *Walker v. L. & N. R. R. Co.*, 111 Ala., 233, 20 South., 358; 6 Cyc., 476.

We think it best to adhere to the general rule in the case before us, and the decree of the chancellor is accordingly affirmed.

Tennessee Power Co. v. Lay.

TENNESSEE POWER COMPANY v. MARY LAY.*

(Nashville. December Term, 1915.)

EMINENT DOMAIN. Remedies of property owners. Actions for damages. Necessity of jury of view. Res. adjudicata. "Coram non judice."

In an action for damages for the taking of land for a power company's lines, wherein the amount of land taken was agreed upon, and the sole issue was its value, where compensatory and incidental damages were assessed by the trial jury, which laid off by metes and bounds the land taken, the proceeding was not *coram non judice*, since the court had jurisdiction of the controversy, although there was no issue as to the land taken, but the judgment was a valid adjudication on the question of damages, although no jury of view was had, since Shannon's Code, section 1866, provides that the injured party may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds, and assess the damages as upon the trial of an appeal from the return of a jury of inquest.

Code cited and construed: Sec. 1866 (S.).

FROM MARION

Appeal from the Circuit Court of Marion County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court—
NATHAN L. BACHMAN, Judge.

T. T. RANKIN, for plaintiff.

JOHN T. RAULSTON, for defendant.

*On the question of right of one whose property has been taken for public use without condemnation proceedings, to maintain action for compensation or for permanent damages, see note in 28 L. R. A. (N. S.), 968.

Tennessee Power Co. v. Lay.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

This action was brought in the circuit court of Marion county by defendant in error, Mary Lay, to recover damages arising out of the fact that the plaintiff in error had entered upon her land and constructed its line of poles, wires, etc., without authority. It was alleged that the plaintiff in error had taken an area of forty feet wide across the farm. The plaintiff in error filed a plea stating that it had taken one hundred feet. The defendant in error then, by leave of the court, amended her declaration so as to allege that the amount taken was one hundred feet, and set out by metes and bounds a description of the land taken; this description purporting to have been drawn from the survey made by the plaintiff in error. It is also substantially alleged in the declaration that the plaintiff in error is a public service corporation, such as would have the right to condemn under our statutes.

A jury was impaneled, and the damages assessed, both for the taking and incidental damages. The jury also found the amount of land which was taken by the plaintiff in error, describing it with exactness as set forth in the amendment to the declaration.

A motion for a new trial was made and continued over to the next term of court. At the latter term the trial judge so far granted the motion as to suggest a remittitur of a part of the damages, and this was accepted by defendant in error. A bill of exceptions was then made up, and the case appealed to the court of

Tennessee Power Co. v. Lay.

civil appeals by the plaintiff in error. That court declined to examine the bill of exceptions on the ground that it was filed too late; no time having been granted at the trial term for its filing thereafter. That court then proceeded to try the case on the technical record, and affirmed the judgment of the trial judge. The case was then brought to this court by the plaintiff in error on the writ of *certiorari*.

Plaintiff in error concedes that it cannot rely upon the bill of exceptions, but insists that the adjudging of the land to it was *coram non judice*, since there was no issue on the subject, and no jury of view was appointed; that therefore it will not be protected by the plea of *res adjudicata* in case an effort should hereafter be made by defendant in error to recover the land or again secure damages, and therefore the result of a final affirmance would be that the defendant in error would recover her judgment for the amount, and the plaintiff in error would receive no consideration.

This is a mistaken view. The parties have agreed in their pleadings as to the land that had been taken and for which the damages were sought, and, no objection having been made as to the amount, or as to the description, the sole purpose of the suit being to recover damages, it was unnecessary to go through the formality of selecting a jury of view to lay off the land. So far as the assessment of damages was concerned, that was properly done by the regular jury impaneled to try the case. This was directly in accord with Shan-

Tennessee Power Co. v. Lay.

non's Code, section 1866. That section provides that the injured party "may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds and assess the damages, as upon the trial of an appeal from the return of a jury of inquest." The pleadings sufficiently covered the controversy, and there was no necessity for any other jury than the regular trial jury; and we must conclude that that jury either ascertained the description of the land from the pleadings, or by proper evidence submitted to them, there being nothing in the record to the contrary.

The result is that the judgment of the court of civil appeals will be affirmed, and a judgment will be entered here in accordance with this opinion.

BLACKWOOD TIRE & VULCANIZING COMPANY v. AUTO
STORAGE COMPANY.

(*Nashville*. December Term, 1915.)

ACCESSION. Doctrine. Effect of. ;

Where the purchaser of an automobile, title to which was retained by the seller, fitted the machine with tire casing, and the seller on nonpayment retook the machine, title to the tire casings passed to the seller, the seller of the casings not having retained title, for such is the rule of "accession," which denotes the right of the owner of corporeal property, real or personal, to any increase thereof from any cause, either actual or artificial.

Cases cited and approved: Southworth v. Isham, 5 N. Y. Super. Ct., 448; *Ex parte Ames*, Fed. Cas. No. 323; Harding v. Coburn, 53 Mass., 333; Comins v. Newton, 92 Mass., 518; Clark v. Wells, 45 Vt., 4; Planter's Bank v. Vandyck, 51 Tenn., 617; Manufacturing Co. v. Buchanan, 118 Tenn., 238; Ice & Coal Co. v. Alley, 127 Tenn., 173; Automobile Co. v. Bicknell, 129 Tenn., 493.

Case cited and distinguished: Holly v. Brown, 14 Conn., 266.

FROM DAVIDSON

Error to the Circuit Court of Davidson County—T.
J. McMOBROUGH, Special Judge.

LEVINE & LEVINE, for plaintiff in error.

M. S. Ross, for defendant in error.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The defendant sold an automobile to one Cooper, retaining title. Thereafter Cooper bought from the

Tire & Vulcanizing Co. v. Auto Storage Co.

plaintiff, and had fitted to the machine certain tire casings; plaintiffs not retaining title. After this, the machine not having been paid for, the defendant retook possession and sold it in the usual way; the tires furnished by plaintiffs still remaining on the machine. Cooper made no claim to the tire casings when defendant retook the machine, and made no objection to the sale. After the sale, however, at the instance of plaintiff, Cooper sold, or purported to sell, these tire casings to the plaintiff; their value at that time to be credited against the charge which plaintiff had made against Cooper when these tire casings were furnished. On this alleged title plaintiff brought its suit against defendant and replevied the tire casings. The trial court dismissed the suit, and subsequently on appeal the court of civil appeals affirmed this judgment. We think both courts were correct.

The controversy arises under the law of accession. As said in *Ruling Case Law*, vol. 1, p. 117:

“The word ‘accession’ is used broadly in the language of the law to signify the right which an owner of corporeal property, real or personal, has to any increase thereof from any cause, either natural or artificial. In this sense it is broad enough to include additions to the value of land by buildings, fences, etc., erected on it, a gradual deposit of soil by the action of water, value added to chattels by labor performed, the increase of animals, or any other mode by which additions to property are made. As a term of legal classification, however, accession is generally employed to

Tire & Vulcanizing Co. v. Auto Storage Co.

signify the acquisition of title to personal property by its incorporation into or union with other property.

“The general rule of the common law in regard to title by accession is that, whatever alteration of form has taken place in personal property, the owner is entitled to such property in its state of improvement, unless the identity of the original materials has been destroyed, or unless the thing has been annexed to, and made a part of, some other thing which is the principal, or its nature has been changed from personal to real property, but if the thing itself, by such acquisition, was changed into a different species, it belongs to the new operator, who has only to make satisfaction to the former proprietor for the materials which he has so converted.”

The proposition contained in the last clause of the authority quoted seems not, however, to apply in favor of a willful trespasser.

As between mortgagor and mortgagee, the rule is that repairs made by the former, or at his instance, become a part of the property, and go with it, and inure to the benefit of the mortgagee. In *Southworth v. Isham*, 5 N. Y. Super. Ct. (3 Sandf.), 448 it appeared that a mortgagor of a vessel removed the old sails, which were worn out, and put on new ones, and then the vessel passed into the possession of the mortgagee. It was held that the new sails passed, as in case of repairs, and that the mortgagor could not maintain trover for the sails. In that case the court quoted with approval the

Tire & Vulcanizing Co. v. Auto Storage Co.

following passage from the opinion in the case of *Holly v. Brown*, 14 Conn., 266:

“If during the term of a mortgage upon a printing establishment, the types and other materials belonging to it are removed, and new ones supplied in their place, if the new types and materials were procured for the purpose of replenishing the establishment mortgaged and of supplying the place of articles belonging to it, which had been lost or destroyed by use, and were attached to and incorporated with it, they would become a part of the establishment, and by right of accession belong to the owners of it. They would form an incident to, and follow the title of, the printing establishment, to which they were attached, which would be the principal thing. As if the borrower of a watch should replace its crystal, or of a musical instrument one of its strings, keys, or pipes, which had been lost, destroyed, or become useless in his service, in which case they would belong to the lender.”

In *Ex parte Ames*, Fed. Cas., No. 323 (Low., 561), it was held that, where a mortgage was made in Massachusetts on an unfinished locomotive, the mortgagee could hold, by accession, the additions afterwards made by the mortgagor before his bankruptcy. In *Harding v. Coburn*, 53 Mass. (12 Metc.), 333, 36 Am. Dec., 680, it was held that where unfinished articles of manufacture are mortgaged, and the mortgagor afterwards adds labor and material to them the mortgagee will hold them as against a creditor of the mortgagor, if they remain substantially the same as when mortgaged.

Tire & Vulcanizing Co. v. Auto Storage Co.

In *Comins v. Newton*, 92 Mass. (10 Allen), 518, it was held that a rifle having a skeleton stock at the time a mortgage was made on it was not so substantially changed by having a new wooden stock, and a new and different kind of a lock substituted for the original by way of repair, as to terminate the lien of the mortgage.

The case of *Clark v. Wells*, 45 Vt., 4, 12 Am. Rep., 187, while apparently out of harmony with the underlying principle of the foregoing cases, is, upon attentive examination, found not to be so. In that case it was held that where one, at the instance of a bailee, put new wheels and axles on a stage wagon, taking the bailee's note for the repairs under an agreement that until payment the repairs furnished should remain the property of the repairer, and, before payment, the owner of the wagon retook it into his possession and sold it to a third person, the repairer might maintain trover against the purchaser for the wheels and axles. While it was said in the opinion that, unlike bolts and thills, the repairs furnished did not become accessions to the principal chattel, yet the court further placed its decision on the ground that the repairer had retained title to the said wheels and axles. The statement of facts in the present case shows that the title to the tire casings was not retained by the Blackwood Tire & Vulcanizing Company. The case just referred to therefore does not impugn the general principle that repairs made by a mortgagor, or at his instance, will inure to the benefit of the mortgagee. We are not to be understood as approving *Clark v. Wells*, nor do we

Tire & Vulcanizing Co. v. Auto Storage Co.

criticize it. The point as to the retention of title to repairs placed on an article of personal property does not arise in the case before us, and therefore we do not pass on it.

In the case before the court it is to be noted that the plaintiff in error sold the tire casings outright, to Cooper, and he permitted these casings to go with the machine into the hands of the defendant in error without objection, and in like manner permitted the sale of the machine with the tire casings attached, and never attempted to retake these casings until later, and then in furtherance of the effort of the plaintiff in error to regain them, and that for this purpose he endeavored to make sale of them at that time to the plaintiff in error. We think it must be laid down as a general principle that the mortgagor, in making repairs on property which he has mortgaged, must be held, in the absence of some distinct evidence to the contrary, to have intended such repairs as a fixed improvement to such property, since the amelioration inures not only to the benefit of the mortgagee, but to his own benefit as well, in the enhancement of the value of his property, to the end that it may go further toward relieving him of the mortgage debt in case sale should be made.

In the case before us, not only was Cooper subject to the presumption indicated, but his acts in permitting the machine to go back into the hands of defendant in error, without objection on the subject of the tire casings, and to be sold in a like manner, indicate as a fact that it was his purpose to make a fixed addition to the

Tire & Vulcanizing Co. v. Auto Storage Co.

property. The plaintiff in error, acquiring his title from Cooper, must stand in his shoes.

In what has been said we have assumed that a sale of personal property with title retained to secure the purchase price would, in respect of the matter in hand, be governed by the same principles that would control a mortgage, and we so hold. At last in such sales the title retained is but a form of lien. *Planters' Bank v. Vandyck*, 4 Heisk., 617; *Manufacturing Co. v. Buchanan*, 113 Tenn., 238, 250, 99 S. W., 984, 8 L. R. A (N. S.), 590, 12 Ann. Cas., 707; *Ice & Coal Co. v. Alley*, 127 Tenn., 173, 178, 154 S. W., 536; *Automobile Co. v. Bicknell*, 129 Tenn., 493, 167 S. W., 108.

On the grounds stated, we are of the opinion that the judgment of the court of civil appeals, sustaining that of the trial court dismissing the action of the plaintiff in error, must be affirmed.

Perry v. Young.

THOMAS A. PERRY *et al* v. FRANK YOUNG *et al*.

(Nashville. December Term, 1915.)

1. JUDGMENT. Personal judgments. Character of notice.

No personal judgment can be rendered against a nonresident served with notice only by publication. (*Post*, pp. 525-546.)

Cases cited and approved: Wilcox v. Morrison, 77 Tenn., 700; Arndt v. Griggs, 134 U. S., 316; Jellenik v. Huron Copper Mining Co., 177 U. S., 1; Roller v. Holly, 176, U. S., 398; Citizens' Savings & Trust Co. v. Ill. Central R. R. Co., 205 U. S., 46; Bryan v. Kennett, 113 U. S., 179; Huling v. Kaw Valley R. & Improvement Co., 130 U. S., 559; Selig v. Hamilton, 234 U. S., 652; Cooper v. Reynolds, 10 Wall., 308; St. Clare v. Cox, 106 U. S., 350; Freeman v. Alderson, 119 U. S., 185; Swift & Co. v. Warehouse Co., 128 Tenn., 82-100.

Cases cited and distinguished: Amparo Mining Co. v. Fidelity Trust Co., 74 N. J. Eq., 197; Goodman v. Niblack, 102 U. S., 556; Pennoyer v. Neff, 95 U. S., 714.

Code cited and construed: Secs. 6115, 6121, 6162 (S.).

2. EQUITY. Jurisdiction. Actions "quasi in rem."

The insured in a life policy who had assigned it to his mother, who thereafter died, sued to reform the policy to conform with the assignment agreement between himself and his mother, that on his mother's death the policy should revert to him. The insurance company appeared by the insurance commissioner. Other resident defendants were personally served. Nonresident distributees of the assignee were served by publication in a collateral attachment proceeding against their distributive shares in the policy. Defendant insurance company demurred to the jurisdiction, alleging that the court had no jurisdiction of the nonresident distributees. *Held* that, since the suit was to settle the interests of only those made parties, it was *quasi in rem*, so that the court, having jurisdiction of

Perry v. Young.

the *res*, or the policy, had jurisdiction of the whole cause and could by its judgment bind the nonresident distributees. (*Post*, pp. 525-546.)

FROM DAVIDSON

Appeal from the Chancery Court of Davidson County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—JAS. B. NEWMAN, Chancellor.

JEFF McCARN and PENDLETON & DEWITT, for plaintiffs.

W. L. GRANBERY and H. E. PALMER, JR., for defendants.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The bill in this case was filed in the chancery court at Nashville on the 25th of September, 1913, by Thomas A. Perry, and his sister Minnie L. Perry, and his sister Betsie Bostick and her husband, W. E. Bostick, against Frank Young and his wife, Mattie Young, and the Mutual Benefit Life Insurance Company of New Jersey.

The bill alleged, in substance, that complainant Thomas A. Perry, some time before the occurrence complained of, had caused to be issued to him a policy of life insurance in the sum of \$2,000 on his life, payable to himself; that he had assigned this policy to

Perry v. Young.

his mother; that the purpose and understanding between him and his mother was that this assignment should be so worded as that the policy should belong to him in case she died before his death; that by oversight this latter provision was left out; that he had sought recently to borrow money from the insurance company on this policy, but it declined to lend unless all of the distributees of his mother should consent to it; that he endeavored to get the defendants Frank Young and wife to agree, as required by the insurance company, but they declined to do so. The bill alleges, in effect, that the complainants and the defendants represent all of the distributees of the deceased mother. The purpose of the bill is to have the policy reformed so as to conform to the original agreement for the assignment made between the complainant Thomas and his mother. The bill charged that the present interest of Mrs. Young, the granddaughter of complainant's deceased mother, would only be \$100, and asked and obtained an attachment, and caused the same to be levied on that interest. A publication was ordered and made for the said Frank Young and wife which indicated the matter in controversy, that is, the policy of insurance, giving its number and the name of the company that issued it, so that the notice showed the matter about which the litigation was projected. The insurance company accepted service of the bill through its accredited agent, the insurance commissioner. This company then filed a demurrer making the point that the court had not acquired jurisdiction

Perry v. Young.

of Young and wife, and therefore its decree would not protect the insurance company; the point being this: That those parties could not be made defendants by publication, but that personal service would be required to bind their interest. The bill shows that they are residents of Texas, and, of course, personal service is impossible. They have not entered their appearance, but as to them the bill stands on the order of publication and the publication thereof.

The chancellor sustained the demurrer filed by the insurance company. On appeal to the court of civil appeals that court overruled the chancellor. The case was then brought to this court on the writ of *certiorari*, and the ground of demurrer before mentioned urged in the chancery court and in the court of civil appeals is urged again here.

We think the court of civil appeals reached the right conclusion. No personal judgment is sought against Young and wife, and none could be rendered against them on publication. The court, however, has before it the insurance company that issued the policy, the complainants Thomas and his two sisters, who represent three of the four distributees of the deceased assignee, and Mrs. Young, the fourth distributee. The court also has within its control the policy of insurance which is the legal evidence of the claim against the insurance company, and the assignment on the back of it, and has the *res* itself, the claim against the insurance company through having the latter company before it. The policy is not actually exhibited

Perry v. Young.

with the bill, but it appears from the allegations of the latter that the property is in the possession of the complainant Thomas A. Perry, and he has submitted himself to the jurisdiction of the court, and it is within its power at any moment to order the actual filing of the policy in the cause.

The court, thus having control of the *res*, can settle the *status* and rights of the parties with respect to the insurance policy, although one of the persons interested therein, under the assignment as it now stands, is a nonresident, and made a defendant only by publication. Our statute (Shan. Code, sec. 6115) provides that suit may be instituted wherever any material defendant is found, unless otherwise provided by law. The insurance company in the present case was a material defendant found in Davidson county. Section 6121, subsec. 4, as to bills against nonresidents, provides that they may be filed in the district or county in which the cause of action arose or the act on which the suit is predicated was to be performed, or in which the subject of the suit or any material part thereof is. Subsection 5 provides that, whenever attachment of property is allowed in lieu of personal service of process, the bill may be filed in the county or district in which the property, or any material part thereof sought to be attached is found at the commencement of the suit. Section 6162 declares that personal service of process on a defendant in a court of chancery is dispensed with when such defendant is a nonresident of the State. The following sections direct how

Perry v. Young.

the fact of nonresidence is to be made known, and the order of publication made, and how long the order shall be published, what it shall contain, etc. No question is made on these technical matters.

The present case belongs to the class of *quasi* proceedings *in rem*. Such proceedings are sufficiently described in 23 Cyc. 1410, by the author of Black on Judgments, in the following language:

“Judgments dealing with the *status*, ownership, or liability of particular property, but which are intended to operate on these questions only as between the particular parties to the proceeding, and not to ascertain or cut off the rights or interests of all possible claimants, are so far *in rem* that jurisdiction may be acquired by the seizure or control of the court over the *res*, together with reasonable constructive notice to parties defendant, but, unlike judgments strictly *in rem*, they are binding only upon the parties joined in the action, and thus notified, and have no effect upon the rights or liabilities of strangers.”

One case in our Reports bearing a pretty close analogy to the present one is that of *Wilcox v. Morrison*, 9 Lea (77 Tenn.), 700. In that case it appeared that Wilcox had executed a trust deed in the State of Virginia conveying real and personal property in that State, and also including therein a judgment which he had in Hawkins county, Tennessee, on one Netherland. After litigation had progressed for considerable time in Virginia, Wilcox came to Tennessee and filed his bill against Netherland, a resident of Tennessee, who

Perry v. Young.

was the debtor in the judgment, and also certain of his creditors who resided in Virginia, and the trustee under the Virginia mortgage who likewise resided there. The bill charged that the debts had been practically settled in Virginia, and that the Tennessee judgment belonged to the complainant Wilcox. The trustee and one of the creditors, residents of Virginia, demurred because the trustee and effects were in Virginia, and the cause was being administered in that state. The demurrer was overruled. Here the court had control of the *res*, the judgment, by having before it the plaintiff in the judgment, and also the defendant, and proceeded to settle the rights of the parties thereunder. It seems from the report of the case that the parties subsequently answered the bill, and so submitted themselves to the jurisdiction, but the overruling of the demurrer indicated the view the court had as to its right to settle the *status* of the parties with respect to the judgment, even against nonresidents.

The case of *Amparo Mining Co. v. Fidelity Trust Co.*, 74 N. J. Eq., 197, 71 Atl., 605, is nearer in point. There it appears that a bill was filed in the chancery court of New Jersey by the complainant corporation against the defendant corporation, the latter a resident of Pennsylvania, for the purpose of having declared the ownership of the complainant as against the defendant of certain treasury stock in the complainant company. It appears from the report of the case that some of the certificates were in Pennsylvania, but the complainant company, which had issued the shares, resided in New

Perry v. Young.

Jersey. The court held that, the *res* being thus situated in New Jersey, it had control thereof, and could settle the rights of the respective parties in respect thereto, although the defendant was a nonresident, and had notice only by publication and other substitutionary process directed by the court. It was held that the court, having control of the complainant whose treasury stock was in controversy, had control of the stock or *res*, since it could order the same into actual custody at any time. The court said:

“In the case at bar no receivership is prayed for, and no party having the custody of the *res* is brought in as a defendant in order to subject the *res* to the control of the court. The situation seems to be analogous to one where a complainant in New Jersey, holding the possession of chattels, filed a bill in this court to obtain equitable relief against a defendant not resident in New Jersey in respect to such chattels. . . . The authorities which control this court indicate, I think, the following as the essential elements of an action *quasi in rem*: (1) A *res* located within the territorial limits of the State in such a way that the State can, if it see fit to do so, exercise absolute power to control and dispose of it. (2) A course of judicial procedure, the object and result of which are to subject the *res* to the power of the State, directly by the judgment or decree which is entered as distinguished from a course of procedure which only affects or disposes of the *res* by compelling a party to the action to con-

Perry v. Young.

trol or dispose of the *res* in accordance with the mandate of the judgment or decree. (3) A course of judicial procedure on its face directed specifically toward the *res* so as to disclose this *res* to the defendant when reasonably notified of the action.”

Further the court said:

“The origin of the jurisdiction of our courts in actions *quasi in rem* is to be found in the power of the sovereign State to exercise control over all objects to which that power can be directly applied. The State must control all property within its territorial limits. Parties interested in that property and residing within the State, or voluntarily coming into the State in order to have their rights in respect of the property in question enforced or protected, have a right to be heard in the courts of the State, and the utmost that can be demanded on the part of nonresident defendants is that they shall be fairly notified of the action so as to have an ample opportunity to appear and be heard therein. When these conditions exist, the rights of all parties interested in the *res* are determined by due process of law. . . . Of course, it must be conceded that in any action to recover stock, if the relief prayed for includes the surrender of a certificate, or the execution of an assignment or power of attorney, such relief can only be obtained by compelling the defendant to act, and, if such relief is the whole relief prayed for, the action, as we have seen, may be strictly *in personam*. In the present case, while the bill prays that the defendant may be decreed to

Perry v. Young.

assign and transfer the shares of stock in dispute, the main relief prayed for is the establishment of the complainant's equitable title. The jurisdiction of the court is sustained by the existence of a trust—a trust in respect of a *res* situate within the jurisdiction of the court and in the custody of a party to the suit. If the complainant shall obtain a decree in this case establishing its right in respect of the *res*, and then shall desire to secure the surrender of the outstanding certificates representing the *res*, it may be obliged to bring a suit in the State of Pennsylvania in order to secure such surrender. . . . The last matter to be considered is whether it is necessary, where the *res* is personal property, to have the *res* actually placed within the custody of the court through the instrumentality of a receiver, in order to give to the action the quality of an action *quasi in rem*. I can find no warrant in reason, and none in the authorities, disregarding a few *dicta*, which makes the actual seizure of the *res* by an officer of the court essential to the *status* of the action as one *quasi in rem*. The fundamental essential, of course, must be that the personal property, which is the *res*, is so situated within the State that it may be seized; in other words, the *res* must be within the control of the State. . . . It is not the actual seizure of the *res* which is the essential element of an action *quasi in rem*, but the power to seize the *res* and to seize it in the action. If the *res* is within the jurisdiction of the court, it may be entirely unnecessary to take possession of it through a

Perry v. Young.

receiver in order to secure its presence when the decree of the court is to be enforced. . . . So long as the *res* is situate within the jurisdiction of the court, and the custodian of the *res* is made a party to the suit, the requirements of an action *quasi in rem* under consideration seems to me to be complied with.

. . . I think it follows from the principles enunciated in a number of recent federal cases, and in the New Jersey cases above cited, that an action like the present one, brought by the complainant to establish a trust in shares of stock in a New Jersey corporation, is an action *quasi in rem*, provided the corporation the stock of which is in litigation is made a party to the suit, and is lawfully subjected to the jurisdiction of the court in which the suit is brought by service of process within the State or by voluntary appearance"—citing *Arndt v. Griggs*, 134 U. S., 316, 10 Sup. Ct., 557, 33 L. Ed., 918; *Jellenik v. Huron Copper Mining Co.*, 177 U. S., 1, 20 Sup. Ct., 559, 44 L. Ed., 647; *Roller v. Holly*, 176 U. S., 398, 20 Sup. Ct., 410, 44 L. Ed., 520; *Citizens' Savings & Trust Co. v. Ill. Central R. R. Co.*, 205 U. S., 46, 27 Sup. Ct., 425, 51 L. Ed., 703.

“All parties, whether resident in New Jersey or residing in other States, may be lawfully brought into the suit by serving process upon the New Jersey residents, and giving the reasonable notice provided by law to the defendants residing in other States. I discover no basis for the proposition that the whole fabric of the action *quasi in rem* falls to the ground unless the court of chancery, through a receiver, at-

Perry v. Young.

tempts in some way to take possession of the *res* and actually obtains such possession. The question remains whether, when the custodian of the *res*, the New Jersey corporation, whose stock constitutes the *res*, comes into court as a party complainant, the case is essentially different from that which is presented where the custodian is made a party defendant. In each case the *res* is subjected to the power of the court, in the one case by the control over the *res*, which the court acquires when the custodian of the *res* is brought into court by service of process, and in the other by the voluntary action of complainant in coming into court and presenting to the court for adjudication his claims in respect of the *res*. No doubt, the court, at the instance of the defendant, may preserve the *res* to meet the decree of the court by an injunction or by a receiver."

This method of deciding rights has been often recognized by the supreme court of the United States. In *Goodman v. Niblack*, 102 U. S., 556, 563, 26 L. Ed., 229, the court said:

"This is a proceeding in equity to enforce a lien on the fund which is within reach of the court, and, as the trustees and complainant have the requisite citizenship, section 738 of the Revised Statutes provides a remedy for inability to serve process by an order of publication. If they appear, the suit will proceed as usual. If they do not appear, the decree, so far as it affects the fund in the hands of Niblack, will bind them; and this is all that is necessary to give the court

Perry v. Young.

jurisdiction to grant the relief prayed for by the complainant.”

In *Bryan v. Kennett*, 113 U. S., 179, 195, 199, 5 Sup. Ct., 407, 28 L. Ed., 908, the supreme court recognized the right of the court to pass title to land within jurisdiction of the court as against minors, although the latter had been made defendants only by publication. So it has been held that the land of one made defendant by publication only may be subjected to a condemnation proceedings for the benefit of a public improvement. *Huling v. Kaw Valley R. & Improvement Co.*, 130 U. S., 559, 9 Sup. Ct., 603, 32 L. Ed., 1045. It has also been held that a court having under its control a corporation for winding-up purposes may make an assessment on the stockholders pursuant to law for the payment of corporate debts, and that persons who are defendants only by publication will be bound by the assessment if they were, in fact, stockholders subject to the law under which the assessment was made, and that they would not be suffered in a collateral proceeding to question the propriety of the assessment itself, although such persons would be permitted to show in such collateral proceedings that they had transferred their stock and might litigate any matter bearing upon the extent or duration of their stockholding. *Selig v. Hamilton*, 234 U. S., 652, 34 Sup. Ct., 926, 58 L. Ed., 1518.

Under the foregoing authorities, and many others that might be cited, we are of the opinion that the defendants Young and wife are properly before the

Perry v. Young.

court under the publication ordered and made, and that they will be bound by whatever decree may be finally made in the cause.

It is proper to say that we do not consider important the attachment that was issued and served on the supposed interest of Mrs. Young in the policy, inasmuch as the complainant asserted no debt against Young and wife, nor any right by which they could subject such interest to sale. The jurisdiction of the court over the *res* depends on other principles which have been fully stated. The publication, however, made under the attachment, served the useful purpose of not only notifying Young and wife of the existence of the suit, and of their duty to appear and defend, but also that the controversy was over a policy of insurance in the defendant company, stating the number of that policy. Thus on reading the notice they will be sufficiently informed of the necessity of appearing and defending any rights that they may wish to assert.

The result is that the decree of the court of civil appeals is affirmed and the cause is remanded to the chancery court for further proceedings.

MR. JUSTICE FANCHER delivered a dissenting opinion as follows:

I cannot give assent to the proposition that the Texas defendant can be brought before the court by publication in this case. The insurance company is a nonresident corporation. It is before the court by service of process upon its agent in this State by

Perry v. Young.

virtue of a statute on the subject. The nonresident defendant has such right in the policy of insurance, or in the subject of litigation that it cannot be taken away from her unless the court can gain jurisdiction over her person.

The principle is well settled by all the courts in this country that no effective personal judgment can be rendered in one State against a nonresident defendant who is not personally served with process and does not appear. *Pennoyer v. Neff*, 95 U. S., 714, 24 L. Ed., 565; *Cooper v. Reynolds*, 10 Wall., 308, 19 L. Ed., 931; *St. Clare v. Cox*, 106 U. S., 350, 1 Sup. Ct., 354, 27 L. Ed., 222; *Freeman v. Alderson*, 119 U. S., 185, 7 Sup. Ct., 165, 30 L. Ed., 372. All the authorities upon the subject of substituted process against a nonresident defendant recognize the right to affect his property, and in this manner bring him before the court, but only to the extent of his property situated within the jurisdiction of the court. The right to summon a party from his distant place of abode and compel him to submit to an adjudication of matters in another State lies only in the right to seize and affect his property located in the State. The law goes no further than this, and this far only upon the presumption that it is supposed a party will look after his property, and, when that is seized by the law, he is bound to take notice.

The case of *Selig v. Hamilton*, 234 U. S., 658, 34 Sup. Ct., 926, 58 L. Ed., 1523, discussed in the opinion of the majority, does not violate the principle above

Perry v. Young.

stated. That was a case affecting the right of a stockholder in a corporation and subjecting him to assessment for payment of debts and arose under the Minnesota statute upon that subject. The corporation was properly before the court, and, of course, all matters affecting the corporation as such, and its property, consequently its stockholders, to the extent of their stock, could be adjudicated. It was held that the statute provided reasonable regulations for enforcing liability assumed by those who became stockholders under the laws of Minnesota. The assessment as to the amount thereof against the stockholders, including the propriety and necessity for same, might be made effective against nonresident stockholders, as well as those who were resident, after proper notice by publication or otherwise, as directed by the court. And in fixing the amount of such *pro rata* liability of stockholders the court would consider the expenses of the receivership, the amount of corporate assets available, the parties liable as stockholders, the nature and extent of such liabilities, considering the probable solvency or insolvency of the stockholders, and expenses in levying the rate upon all the parties. It was expressly held that in determining these matters the judgment of the court was not in the nature of a personal judgment, but the stockholders were deemed to be represented by the corporation itself, which was before the court. This upon the principle of the obligation assumed by virtue of the relationship of the stockholders to it. However, in order to give the stock-

Perry v. Young.

holder the right to make any personal defense, this course of procedure did not preclude him from showing he was not a stockholder, or not a holder of as many shares as was alleged, or that he had a claim against the corporation, or any other defense personal to himself. In bringing the corporation before the court, the stockholders were necessarily before the court, inasmuch as the several shares owned by the stockholders compose the corporate body. The right to bring the stockholder before the court in the first instance, however, is upon the logical basis that, being a mere shareholder in the corporation, he was presumed to be represented by the general corporate body, and he was before the court upon the same principle that a nonresident may be brought before the court in any other action to the extent that he has property subject to seizure within the jurisdiction of the court.

The New Jersey case of *Amparo Mining Company v. Fidelity Trust Co.*, 74 N. J. Eq., 197, 71 Atl., 605, cited in the majority opinion, likewise falls within the same rule. The court had the corporation before it, the stock of which was owned in part by the nonresident corporation sought to be brought before the court as a defendant. It was held that the stock of the corporation before the court could be ordered before it at any time. Manifestly this was true, since the stock is but a share in the concern itself which was before the court. Having the corporation before the court, it had the several shares within its control. These

Perry v. Young.

shares had been issued in the State of New Jersey, and the principal corporation was a resident of that State, and was before the court of the State of its residence.

I do not consider the case of *Wilcox v. Morrison*, 9 Lea, 700, as authority here. It seems clearly distinguishable to my mind. The judgment in Tennessee was against a resident of Tennessee. Wilcox, the judgment creditor, had transferred this judgment to a trustee in Virginia. Afterward Wilcox sought in equity to assert his rights to this Tennessee judgment on the ground that the Virginia debts had been settled, and it was held he could bring before the court the non-resident trustee to whom the judgment had been assigned. This was correct upon the principle that the nonresident trustee would have notice of matters concerning this judgment just as he would be presumed to look after property in Tennessee. His rights under the judgment could only be asserted here, and he was forced to take notice that the court of equity, having power to control this judgment, was asserting this power. It was very much as if he were a party to the judgment sought to be affected, because that judgment had been assigned to him by the plaintiff.

I do not regard the matters affecting this Texas defendant in the present case as coming within that large class of cases which are not strictly actions *in rem*, but are often spoken of as actions *quasi in rem*. These actions *quasi in rem* only seek to subject certain property of the owner to the discharge of the claim

Perry v. Young.

asserted, such as attachment cases, actions for the enforcement of mortgages and other liens, and all other proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff. They differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected so that citation to him is required, and the judgment therein is only conclusive between the parties.

The State has power over property within its limits owned by nonresidents, and it is by virtue of this ownership that tribunals can inquire into the non-resident's obligations to its citizens. The inquiry in such case can only proceed so far as may be necessary for the disposition of the property. If the nonresident possesses no property within the State, there is nothing upon which its tribunals can act. *Pennoyer v. Neff*; *Freeman v. Alderson*, *supra*.

Now in the present case, as I view it, the Texas defendant has no property within this State. She is not a stockholder of the insurance corporation. She has no such interest in the affairs of the corporation as that she will be presumed to take notice of anything respecting the court's action as to the liability of the insurance company.

It is said that the *res* is before the court in this case. To my mind, no *res* is here. The claim is not the *res*. The action is entirely personal. Suit upon the subject-matter of this litigation might be brought

Perry v. Young.

in any State so far as the insurance company is concerned, where it might be served with process through its proper agents. The Texas defendant might bring her suit involving her rights in any court in any State having such jurisdiction. Furthermore, the property of the insurance company is not before the court, nor involved in the suit. Then upon what principle must she take notice of a suit against the corporation here in Tennessee? The policy of insurance is like a note. It is not property. It is only the evidence of the obligation. The obligation itself is like a thing in the air which may fly anywhere. The suit is to change or declare a liability of the insurance company personal in its nature. Can it be that a nonresident having an interest in that contract must take notice of the proceeding and appear because the insurance company is before the court? Suppose this action had been brought in any other of the many States where the insurance company, no doubt, does business and has agents; will Mrs. Young, the nonresident having an interest in the obligation of insurance, be forced to take cognizance and appear, upon mere constructive notice? We think not.

It was suggested in argument that under modern insurance the policy holder has a right to share in certain surplus arising from the earnings on money paid in by the policy holder as premiums in excess of the amount necessary to carry the actual risk. If this be so, it is still a personal relationship arising from the contract of insurance, the main feature of which

Perry v. Young.

is the insurance, not as an investment or shareholder in the company, but to indemnify the holder against the loss. But, if the policy holder, under modern insurance, has certain rights in the earnings of the company, this suit is not to change or affect the *status* of policy holders in general upon the principle that they hold a position analogous to stockholders. In point of fact, such policy holders do not stand in such relationship that a suit against the company will authorize the court to deal with them upon the grounds held in *Amparo Mining Company v. Fidelity Trust Co.* and *Selig v. Hamilton*, supra, that, having the corporation before the court, the shares therein are subject to its orders. This is not a suit to change the relationship of the shareholders to the corporation. It is a suit entirely of a personal nature and involving the rights under one policy alone.

The publication has its office, but it does not give actual notice. The party sought to be brought before the court in reality is before the court by the publication, not alone, but in conjunction with the assertion by the court of control over the property or *res* within its jurisdiction.

Webster defined "due process of law" in his argument in the Dartmouth College Case as "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." Within that fundamental right, how can it be said that a court proceeds to hear and give trial when no actual personal notice is given, and when no property of the

Perry v. Young.

defendant is affected within the control of the court, which will afford presumptive notice?

The whole proposition reduces to the question of notice. I am unable to see how notice can be had as here attempted, within the rules governing the action of courts exercising power only within a given jurisdiction, within which the defendant does not come. I therefore respectfully dissent from the opinion of the majority on this question, believing the chancellor was correct sustaining the demurrer of the insurance company:

MR. JUSTICE BUCHANAN delivered a dissenting opinion as follows:

“Jurisdiction has been well defined to be a power constitutionally conferred upon a judge or magistrate to take cognizance of and determine causes according to law and to carry his sentence into execution.” *Swift & Co. v. Warehouse Co.*, 128 Tenn. (1 Thomp.), 82-100, 158 S. W., 480; Cyc. vol. 11, p. 660. The primary question in the present case is whether such power was in the chancery court of Davidson county, in respect of the right of Mrs. Young which it was the purpose of the bill to have the court adjudicate by its decree. His honor the chancellor held that, under the facts disclosed by the bill, no such jurisdiction or power existed in his court, and, in my opinion, that holding was correct. The right sought to be affected by the decree was one which existed wholly under contracts referred to in the bill. The first of these was

Perry v. Young.

a contract between complainant and the insurance company; the second a contract of assignment between complainant and his mother by which complainant made an assignment, absolute on its face, of all his rights under the insurance contract to his mother. The mother died, and, by operation of law, all her rights under the absolute assignment were cast upon her distributees; Mrs. Young being one of this class. The bill was filed for the purpose of reforming the contract between complainant and his mother in such manner as to wholly defeat the right of Mrs. Young and the other distributees, under the assignment and descent cast, as above stated.

Now the right of Mrs. Young, under the foregoing contracts, is wholly incorporeal in character. It is a right in property of the same character. Her right is one which inheres in her person. It is attached to no tangible property, and it is capable of being brought into judgment only by personal service of process upon her, affording notice to her that her right is in question, and opportunity to defend the same. It is not pretended that such service of process was had upon her. She was beyond the jurisdiction of the court when the bill was filed, and when the court sustained the demurrer to its jurisdiction. She was at the times aforesaid a resident of the State of Texas. If the case were different in its facts, as, for instance, if the bill had sought to subject, under the decree of the court, a right to real property within the local jurisdiction of the court, or a right to tangible

Perry v. Young.

personal property located within the jurisdiction of the court, or other character of property so situated that the court assuming the jurisdiction would be in a position to protect the rights of parties, the court might well have assumed jurisdiction. In such classes of cases the court can lay its hand upon the property, and thereby draw into its jurisdiction the rights of parties attached to the particular property over which the court has assumed jurisdiction. But no such case is presented here. The property right of Mrs. Young is wholly intangible, and is attached to no property which by any proceeding in this cause has or can be brought within the local jurisdiction of the court. Her property right sought to be reached by the decree is inseparable from her person, except by her voluntary surrender of it with or without consideration, her death, or the judgment or decree of a court of competent jurisdiction founded on her voluntary appearance or process personally served upon her.

“The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity, and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. ‘Any exertion of authority of this sort beyond this limit . . . is a mere nullity,

Perry v. Young.

and incapable of binding such persons or property in any other tribunal.' '' *Pennoyer v. Neff*, 95 U. S., 714, 24 L. Ed., 565.

As I see this suit, it was not a proceeding *in rem*, nor even one *quasi in rem*, but was purely a personal action involving only personal and intangible property rights where the jurisdiction of the subject-matter of the suit could only be acquired by personal service of process upon the parties in interest. In *Pennoyer v. Neff*, supra, it was said:

“Jurisdiction is acquired in one of two modes: First, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question, and it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*.’’

On the grounds above stated, and those advanced in the dissenting opinion of Mr. Justice FANCHER, in which I concur, I respectfully dissent from the opinion of the majority of the court in this cause.

Cohn v. Lunn.

SAM COHN v. J. N. LUNN.*

(*Nashville*. December Term, 1915.)

1. BILLS AND NOTES. Validity. Illegal transactions.

A note executed in violation of a penal statute is absolutely void not only between the parties, but even as against an innocent holder. (*Post*, pp. 549-550.)

Acts cited and construed: Acts 1897, ch. 77.

Cases cited and approved: *Webb v. Tarver & Wife*, 2 Tenn., Chan. App., 366; *Pinney v. First Nat. Bank of Concordia*, 68 Kan., 223; *Snoddy v. Bank*, 88 Tenn., 573; *Bank v. Chapman*, 122 Tenn., 415.

2. BILLS AND NOTES. Recital of consideration. Note for patent right.

Where a party sold defendant a quantity of patented articles and granted him an exclusive right to sell such articles, and such others as he might order, in certain territory, and in consideration of the articles purchased, and the exclusive right to sell, defendant executed his note for \$495, the note was not invalidated by noncompliance with Acts 1897, ch. 77, sec. 1, making it unlawful to take or receive any note for the sale of a patent right or any interest therein unless it shall clearly appear upon the face of the note that it is given in the purchase of a patent right or interest therein, as a license to sell patented articles conveys no interest in the patent. (*Post*, pp. 550-552.)

Case cited and construed: *Waterman v. Mackenzie*, 138 U. S., 252.

3. BILLS AND NOTES. Penal statutes. Construction.

Acts 1897, ch. 77, requiring notes given for the sale of a patent right or interest therein to show on their face that they are so given, and making a violation thereof a felony, is a penal act, and must be strictly construed. (*Post*, pp. 552, 553.)

Cases cited and approved: *Woods & Sons v. Carl*, 203 U. S., 358; *Allen v. Riley*, 203 U. S., 347.

*The question of notes for patent rights is discussed under general phases in notes in 20 L. R. A., 605; 10 L. R. A. (N. S.), 842; 24 L. R. A. (N. S.), 1057; 29 L. R. A. (N. S.), 385.

Cohn v. Lunn.

FROM DAVIDSON

Appeal from the Circuit Court of Davidson County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—H. M. MEEKS, Judge.

NATHAN COHN, for plaintiff.

JNO. T. ALLEN, for defendant.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

On November 9, 1911, one Notman sold to defendant three hundred and thirty-three "fuel savers," patented articles. At the same time, as "territorial agent" of his company, the owner of the patent, he arranged to let defendant have an exclusive right to sell these articles and such others as he might order, in the State of Tennessee, a writing being delivered at the time, duly signed by the owner of the patent, and delivered to defendant. In consideration of the articles purchased and the exclusive right to sell in Tennessee, defendant executed to Notman his note for \$495, due at a future date. This note was within a day or two thereafter sold by Notman to the plaintiff, the latter purchasing for a valuable consideration and without notice of any infirmity in the instrument.

Cohn v. Lunn.

The note not being paid at maturity, plaintiff sued defendant before a justice of the peace. After judgment before that officer the case was taken by appeal to the circuit court of Davidson county, and judgment was there rendered in favor of defendant. On appeal to the court of civil appeals that judgment was affirmed. The case was then brought here under the writ of *certiorari*.

It is insisted in support of the judgment that the note was absolutely void, because executed in violation of chapter 77 of the Acts of 1897 of this State.

Section 1 of this act reads:

“Hereafter it shall be unlawful for any person, either in his own behalf or in a representative capacity to take or receive for the sale of a patent right or any interest therein, a note or other written security given for such right or any interest therein unless it shall clearly appear upon the face of the note or other security that the same is given in the purchase of a patent right or an interest therein.”

Section 2 makes the violation of section 1 a felony punishable by imprisonment in the penitentiary for not less than one nor more than five years.

It is insisted that, inasmuch as the note in question was executed in violation of a penal statute, it was absolutely void, not only between the parties, but even as against an innocent holder.

It is clear that a note given in violation of a penal statute would be void as between the parties. *Webb v. Tarver and Wife*, 2 Tenn. Chan. App., 366; *Pinney*

Cohn v. Lunn.

v. *First National Bank of Concordia*, 68 Kan., 223, 75 Pac., 119, 1 Ann. Cas., 331, and note.

In *Snoddy v. Bank*, 88 Tenn., 573, 13 S. W., 127, 7 L. R. A., 705, 17 Am. St. Rep., 918, it was held that a note given for a gaming consideration was void in the hands even of an innocent holder; but in the later case of *Bank v. Chapman*, 122 Tenn., 415, 423, 424, 123 S. W., 641, it was said that *Snoddy v. Bank* was based on an express statute, making the contract void in direct terms.

But it is unnecessary to go into this phase of the case. The real question to be determined is whether the facts show that Notman or his company assigned to defendant a patent right or any interest therein. It is clear that what operated as a consideration for the note consisted only of the three hundred and thirty-three fuel savers, and an exclusive license to sell in Tennessee. License to sell patented articles does not convey any interest in the patent. *Waterman v. Mackenzie*, 138 U. S., 252, 11 Sup. Ct., 334, 34 L. Ed., 923.

In that case, after referring to the fact that under the federal laws the grant to the patentee, his heirs and assigns, is of the exclusive right to make, use, and vend the invention, etc., it is said:

“The monopoly thus granted is one entire thing, and cannot be divided into parts except as authorized by those laws. The patentee, or his assigns, may, by instruments in writing, assign, grant and convey, either: (1) the whole patent, comprising the exclusive

Cohn v. Lunn.

right to make, use, and vend the invention throughout the United States; or (2) an undivided part or share of that exclusive right; or (3) the exclusive right under the patent within and throughout a specified part of the United States. . . . Any assignment or transfer short of one of these, is a mere license, giving the licensee no title to the patent, and no right to sue at law in his own name for an infringement."

Among other matters in that case, the court considered an instrument by which the owner of the patent granted to another "the sole and exclusive right and license to manufacture and sell fountain pen holders containing the said patent improvement throughout the United States." The court said that this did not include the right to use such penholders, at least if manufactured by third persons, and was therefore a mere license, and not an assignment of any title.

In another part of the opinion the court said the grant of an exclusive right under the patent within a certain district which did not include the right to make and use and the right to sell was not the grant of a title in the whole patent right within the district, and was therefore only a license.

"Such, for instance," said the court, "is a grant of the full and exclusive right to make and vend within a certain district, reserving to the grantor the right to make within the district to be sold outside of it. . . . So is a grant of the exclusive right to make and use, but not to sell, patented machines within a certain dis-

Cohn v. Lunn.

strict. . . . So is an instrument granting the sole right and privilege of manufacturing and selling patented articles, and not expressly authorizing their use, because, though this might carry by implication the right to use articles made under the patent by the licensee, it certainly would not authorize him to use such articles made by others.”

Our act of 1897 above referred to forbids the taking of a note “for the sale of a patent right or any interest therein,” unless it shall appear upon the face of the note that it was given “in the purchase of a patent right or an interest therein.” The language quoted must be construed in its technical sense, which we have found does not include a license to sell patented articles. We say it must be construed strictly because it is a penal act. For the purposes of the present case it must be construed as if one were before us under an indictment charging him with a violation of this statute.

We are fully aware of the fact that the evil sought to be remedied by the legislature was the practice of frauds by wandering vendors of patents and interests in patents. It may be also that the purpose was to reach instances wherein merely the sale of territory was made under such a license as we have before us in the present case. If so, the language is not sufficient to cover it, and we cannot stretch the statute to reach the particular case. In the State of Arkansas the evil has been remedied by an act which, in direct terms, makes the note void in the hands of an innocent holder,

Cohn v. Lunn.

and this was held constitutional in *John Woods & Sons v. Carl*, 203 U. S., 358, 27 Sup. Ct., 99, 51 L. Ed., 219. Whether the Arkansas statute would cover a state of facts such as we have before us we do not consider, but only refer to the provision making void the negotiable instrument in the hands of every one. There is a somewhat similar case arising under a Kansas statute. *Allen v. Riley*, 203 U. S., 347, 27 Sup. Ct., 95, 51 L. Ed., 216, 8 Ann. Cas., 137. The latter act however, does not provide that the note shall be void in the hands of an innocent holder.

On the grounds stated; we are of the opinion that the judgment of the court of civil appeals was erroneous, and must therefore be reversed, and a judgment will be entered here in favor of the plaintiff for the amount of the note and interest, and for the costs, and a reasonable attorney's fee provided for in the face of the note.

Tillman v. Lewisburg & N. R. Co.

MARTHA S. TILLMAN *v.* LEWISBURG & NORTHERN RAIL-
ROAD COMPANY.

(*Nashville*. December Term, 1915.)

1. **STIPULATIONS.** Condemnation proceedings. Agreement.
Effect.

Where, in condemnation proceedings, by agreement the right was reserved to a co-owner to claim in a future suit incidental damages to another tract of land, her case in such subsequent suit must be viewed as if her claim to damages were being urged in the condemnation proceeding. (*Post*, p. 556.)

2. **EMINENT DOMAIN.** Right to damages. Separate titles.

Where a wife owned a tract of land, and, together with her husband as tenant by the entirety, owned a tract across a public turnpike which was used with individually owned tract, she could not, upon condemnation by a railroad of a right of way through the tract owned by her and her husband by the entirety, recover damages to the tract individually owned by her. (*Post*, pp. 556-561.)

Cases cited and approved: *Indiana, etc., R. Co. v. Conness*, 184 Ill., 178; *Conness v. Indiana, etc., R. Co.*, 193 Ill., 464; *Potts v. Railroad Co.*, 119 Pa., 278; *U. S. v. Inlots*, Fed. Cas., No. 15, 441a; *Leavenworth, etc., R. Co. v. Wilkins*, 45 Kan., 674; *Southern R. Co. v. Jennings*, 130 Tenn., 450.

Cases cited and distinguished: *Chicago, etc., R. Co. v. Drexel*, 110 Ill., 80; *Smith County v. Labore*, 37 Kan., 480; *Glendenning v. Stahley*, 173 Ind., 674.

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—A. G. RUTHERFORD, Judge.

Tillman v. Lewisburg & N. R. Co.

J. M. ANDERSON and LEWIS TILLMAN, for plaintiff.

F. M. BASS, JNO. B. KEEBLE and ED. T. SEAY, for defendant.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

In this cause a demurrer to the declaration was sustained by the circuit judge, and the court of civil appeals on appeal affirmed the ruling.

In the declaration it was averred that in March, 1896, plaintiff and her husband became the owners as tenants by the entirety of a tract of one hundred and five acres; that in June, 1887, plaintiff became the owner, to her sole and separate use, of a tract of twenty-five acres lying opposite the one hundred and five-acre tract and separated from it only by a public turnpike; that the plaintiff's residence is located on the smaller tract; that the two tracts were and had been continuously used and operated together, or as one farm; and that the residence, barn, and servants' houses situated on the one are supplied with water by means of a reservoir located on the other tract.

It was further averred that the railway company had instituted a proceeding to condemn a strip through the larger tract as a right of way, and that for the value of that strip and for incidental damages to the remainder of that one hundred and five-acre tract plaintiff and her husband, tenants by the entirety, had received payment; but that, under the terms of an

Tillman v. Lewisburg & N. R. Co.

agreement in that proceeding, the right was reserved to plaintiff to claim in a future suit incidental damages to the smaller tract, so individually owned by plaintiff. The present action was thereupon brought for this purpose.

The demurrer set forth two grounds: (1) That plaintiff's land was not shown to be a part of the tract, a portion of which was taken for the right of way; and (2) that the title to land as to which damages are now claimed was in plaintiff, and the title to the one hundred and five-acre tract subjected to the easement was vested in her and her husband, and that, the ownership being thus variant, the claim of damages could not be supported.

In our opinion a decision on the last point will be determinative of the question of liability, and we shall not discuss the first.

As we consider, the case of plaintiff must be viewed as if her claim to damages to the smaller tract were being urged in the condemnation proceeding that affected the larger tract. The damages of the character claimed can only be such as are incident to the taking of a part of the latter tract for a railway right of way.

The authorities are surprisingly few that deal with the question of an allowance of incidental damages to the owner of an adjoining tract where the titleholding of the same is not identical with that of the lands affected by the actual condemnation-taking, both of which tracts are claimed to be actually used as one.

Tillman v. Lewisburg & N. R. Co.

In *Indiana, etc., R. Co. v. Conness*, 184 Ill., 178, 56 N. E., 402, it was held, where a strip of land was condemned wholly within a quarter section owned by a person in fee, that the owner might also recover for injury to his interest as a tenant in common of a remainder estate in an adjoining quarter section. On a second appeal of the case, the interference with the operation of the two sections as one farm was urged as a ground of relief (*Conness v. Indiana, etc., R. Co.*, 193 Ill., 464, 62 N. E., 221), and it was further held that the jury could not take into consideration the fact that the right of way would divide the two sections so as to render difficult of access to the owners of the quarter held in fee to wells and buildings, located on the quarter in which his interest was one as tenant in common in remainder. It was said that the jury must not take into account the fact that the right of way divided the two interests, but must consider each as if they were standing alone, or "as if the other of the two interests belonged to an entire stranger." Yet a judgment for some damage to the untouched quarter section was allowed to stand, but that appears to have been based on a provision of the Constitution of Illinois, and this particular ruling makes the case an inapplicable precedent in this State.

In *Chicago, etc., R. Co. v. Dresel*, 110 Ill., 89, it appeared:

Dresel was in the possession of lots two to fifteen, inclusive, cultivated by him as a whole as a flower garden. Lots two to nine were held under a lease.

Tillman v. Lewisburg & N. R. Co.

Lots ten to fifteen were owned by him in fee. The strip sought to be condemned was off of the leased lots, and it was attempted to be subjected as a part of a leasehold interest. His residence and barn were upon lots fourteen and fifteen.

Instructions of the trial judge to the jury were approved which went on the theory that if the lots had a special capacity, as an entirety, for the purpose of flower gardening, and were so used, Dresel could recover for depreciation of the value of the whole for the residue of the lease term. The court said:

“Appellant proposed to take a portion of the lots held by the lease. If by so doing the market value of the whole track was lessened during the two years which appellee had the right to hold and use the same, to that extent he was damaged, and while no part of the lots he owned in fee was taken, still, by the taking, as his property held in fee and by lease was damaged, he, in justice, ought to be entitled to recover so far as the market value of his property was depreciated.”

See, also, in the same connection, *Smith County v. Labore*, 37 Kan., 480, 15 Pac., 577.

Glendenning v. Stahley, 173 Ind., 674, 91 N. E., 234, dealt with a claim of damages incident to the laying out of a public highway. Glendenning owned an eighty-acre tract lying immediately north of the highway, and he and his wife as tenants by entirety owned a twenty-acre tract lying directly south of the road. It was sought to show the market value of the twenty

Tillman v. Lewisburg & N. R. Co.

acres, considered in connection with, because used along with, the eighty-acre tract, as at the time farmed. The trial court excluded the offered testimony, saying:

“It is settled that, in determining the amount of special benefits or damages sustained by any one proprietor, all land belonging to him lying in a contiguous body, and used together for a common purpose, will be considered as one tract or farm. . . . This principle cannot be extended to cover lands owned by different proprietors, although contiguous and used under one management and for a common purpose.”

In *Potts v. Railroad Co.*, 119 Pa., 278, 13 Atl., 291, 4 Am. St. Rep., 646, the land condemned was the individual property of Potts, while the second tract was the property of Potts and another as tenants in common. Held that, notwithstanding a claim of a common use, the assessment of damages should be confined to the lot a portion of which was taken for the railroad's use; “the fee was held and owned by different persons; neither of them could be considered as appurtenant to, or part and parcel of, the other.”

Where a leasehold estate was condemned, a claim for damages by the lessee in respect of property owned by him individually, separated from the condemned property by an alley, but used by him in connection with that property in the conduct of his business, was denied. *U. S. v. Inlots*, Fed. Cas., No. 15, 441a.

The case of *Leavenworth, etc., R. Co., v. Wilkins*, 45 Kan., 674, 26 Pac., 16, relied on by appellee railway

Tillman v. Lewisburg & N. R. Co.

company, went off on a question of pleading without the court reaching the particular question of substantive law now under consideration. The case of *Smith County v. Labore*, supra, was cited, but its ruling on the immediate question was not disapproved.

We think the better rule is that announced in the *Indiana* and *Pennsylvania* cases.

In the case at bar we think it quite manifest that plaintiff's claim cannot be supported on principle. The two tracts are held by different titles vested in different persons. Separate condemnation proceedings would be required to condemn a right of way over them, and separate suits would have to be brought for damages by the distinct owners against an appropriator for injuries done the tracts. When we look upon a condemnation as a compulsory sale, made for the parties by the law (*Southern R. Co. v. Jennings*, 130 Tenn., 450, 171 S. W., 82), the law thus would bring the railway in confrontation with two distinct ownerships.

Assume that the plaintiff, Mrs. Tillman, were the owner, as tenant in common, of a one-tenth undivided interest in the larger tract. May it be held that a condemnation affecting that small interest would support the claim here urged for damages done to the entire tract solely owned by her? If so, other such tenants in common owning contiguous tracts individually could do so in like manner, and it is conceivable that if the right of way were taken out of a small boundary so owned in common, surrounded by large

Tillman v. Lewisburg & N. R. Co.

tracts severally owned by the tenants in common, enormous damages could be collected from the condemnor under the rule contended for by the appellant.

Let the attitude of the case be reversed, by supposing that plaintiff's individually owned tract had been specially benefited by the construction of the railway over the adjoining tract, but that the balance of the larger tract was incidentally damaged. Would it be either fair or sound to hold that this incidental damage should be offset by the benefits accruing to the smaller tract? Would it not be an abundant reply that mutuality of parties or ownership was lacking to justify such a set-off? We think so.

We think the case has been properly disposed of. Writ of *certiorari* denied.

NEIL, C. J., being incompetent, took no part in the decision in this case.

I. J. COOPER RUBBER CO. v. J. T. JOHNSON *et al.*

(Nashville. December Term, 1915.)

**1. CORPORATIONS. Foreign corporations. "Doing business."
"Factor." "Commission merchant."**

A foreign corporation, which consigned tires for sale to a company handling automobile accessories in the State, was not "doing business" within the State to render necessary compliance with the foreign corporation act as a condition precedent to its right to recover of the sureties on the bond of the consignee, since the business of a "factor" or "commission merchant," synonymous terms, meaning one whose business is to receive and sell goods for commission, is not the conduct of an agency or business for the consignor of the goods sold where the factor picks customers at his own risk and the consignor does not exclusively own the proceeds. (*Post*, pp. 564-567.)

Case cited and approved: *Gunn v. White Sewing Machine Co.*, 57 Ark., 24.

Cases cited and disapproved: *Com. v. Parlin*, 118 Ky., 168; *Hessig-Ellis Drug Co. v. Sly*, 83 Kan., 60; *Stein Double Cushion Tire Co. v. Wm. Fulton Co.* (Tex. Civ. App.), 159 S. W., 1013; *Sucker State Drill Co. v. Wirtz*, 17 N. D., 313; *Harrell v. Peters Cartridge Co.*, 44 L. R. A. (N. D.), 1094.

Cases cited and distinguished: *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed., 1; *Allen v. Tyson-Jones Buggy Co.*, 91 Tex., 22.

2. CORPORATIONS. Foreign corporations. Doing business.

The requirement of a contract between a foreign rubber company and a local company selling tires for the rubber company on commission that the local company should keep the goods insured in the name of the rubber company did not constitute the local company a business agency of the rubber company so to render the latter subject to laws relating to doing business in the State. (*Post*, pp. 567, 568.)

I. J. Cooper Rubber Co. v. Johnson.

Cases cited and approved: *Wasey v. Whitcomb*, 167 Mich., 58; *Three States Buggy, etc., Co. v. Com.*, 32 Ky. Law Rep., 385; *Sturm v. Boker*, 150 U. S., 312.

3. **CORPORATIONS.** Foreign corporations. "Doing business."

The provision of the contract for the sale on commission of automobile tires consigned to an automobile accessories company in the State by a foreign rubber company that the former should make adjustments necessary under the selling guaranty out of the latter's stock in its hands did not render the rubber company subject to laws relating to engaging in business within the State. (*Post*, pp. 568, 569.)

4. **PRINCIPAL AND SURETY.** Release of surety. Extension of time for payment.

Where a company received tires for sale on consignment from a rubber company, the contract providing that monthly remittances of the proceeds of sales should be made in cash, the fact that the company was permitted to fall behind in its payments, and the rubber company accepted a note for a month's sales payable in thirty days, did not release the surety on the consignee's bond, except as to the payment covered by the note, since, if a surety is liable for different payments, an extension of time as to one or more will not affect his liability for others. (*Post*, pp. 569, 570.)

Cases cited and approved: *Klein v. Long*, 27 App. Div., 158; *Cohn v. Spitzer*, 145 App. Div., 104; *Shepard Land Co. v. Banigan*, 36 R. I., 25.

5. **PRINCIPAL AND SURETY.** Release of surety. Extension of time for payment.

Where successive payments are to be made at fixed periods, if the creditor gives time as to one of such payments, he will release the surety as to it. (*Post*, pp. 569, 570.)

FROM DAVIDSON

Appeal from the Chancery Court of Davidson County.—JOHN ALLISON, Chancellor.

I. J. Cooper Rubber Co. v. Johnson.

F. M. BASS and E. J. WALSH, for appellant.

CLARENCE T. BOYD, for appellees.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This suit was instituted by the Cooper Rubber Company, an Ohio corporation, to recover of Johnson and Tinsley, as sureties on a bond executed by the Standard Vulcanizing & Tire Company (called the tire company in this opinion), as principal.

The tire company was engaged in handling automobile accessories in Nashville, and entered into a contract with the rubber company by the terms of which the latter agreed to consign to the former tires, etc., for a designated period. On account of its lack of financial ability or standing, the tire company was required to execute a bond to save harmless the rubber company in respect of a breach of the contract by the tire company.

The first and main defense of the sureties is that the complainant rubber company had not complied with our foreign corporation acts, and was doing business in this State through the agency of the tire company; therefore that it may not maintain the suit because of the failure to so comply. This defense was sustained by the chancellor.

The contract between the two companies is in character one of consignment of merchandise for sale, unless one or more of its provisions later to be set out, relied

I. J. Cooper Rubber Co. v. Johnson.

on by appellee as so doing, mark it as one governing the parties as principal and agent—the tire company as agent through which the rubber company did business in this State.

A contract quite similar as to the main provisions was involved in the case of *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed., 1, 84 C. C. A., 167, writ denied 212 U. S. 557, 29 Sup. Ct., 686, 53 L. Ed., 658, in the court of appeals of the eighth circuit. In reply to the same defense that is here interposed—that the plaintiff rubber company had never qualified to do business in the state of Colorado, and that it could not therefore maintain suit in that State—the court said:

“It (the foreign corporation) agreed to ship the goods from its warehouse, or its mill, upon the orders of the appellee, to that company in Denver; and it did so. It contracted to do, and it did nothing more. It never had any office or place of business in Colorado. It never received, stored, handled, or sold any goods, or collected any money for the sales of any goods, in that State under this contract. It never incurred, assumed, or paid any expenses of doing all these things, or of conducting any of the business. The shoe company had and maintained a place of business in Colorado, it rented or owned the place in which the business in Colorado was done, and it agreed to bear all the expenses and losses of receiving, storing, and selling the goods, and it did so. The purchasers of the goods were purchasers from it, solicited and secured by it. They were

I. J. Cooper Rubber Co. v. Johnson.

its customers, and liable to it for the purchase price of the goods. . . . The rubber company did not agree to do, and did not actually do, any of the business of receiving, storing, and selling the goods in Colorado. The shoe company did agree to do, and did do, that business. These facts have driven our minds with compelling force to the conclusion that, within the true intent and meaning of the Constitution and statutes of Colorado, the rubber company was not doing business in that State, and the contracts between these litigants are valid and enforceable.”

Among other cases cited on the point in the opinion just quoted from are *Allen v. Tyson-Jones Buggy Co.*, 91 Tex., 22, 40 S. W., 393, 714, and *Gunn v. White Sewing Machine Co.*, 57 Ark., 24, 20 S. W., 591, 18 L. R. A., 206, 38 Am. St. Rep., 223, and cited for disapproval is the contrary ruling in *Com v. Parlin*, 118 Ky., 168, 80 S. W., 791. See, also, the later cases of *Hessig-Ellis Drug Co. v. Sly*, 83 Kan., 60, 109 Pac., 770, Ann. Cas., 1912A, 551; *Stein Double Cushion Tire Co. v. Wm. Fulton Co.* (Tex. Civ. App.), 159 S. W., 1013; *Sucker State Drill Co. v. Wirtz*, 17 N. D., 313, 115 N. W., 844, 18 L. R. A. (N. S.), 135, and note; and note to *Harrell v. Peters Cartridge Co.*, 44 L. R. A. (N. S.), 1094.

In *Allen v. Tyson-Jones Buggy Co.*, supra, in speaking of such a foreign corporation's status to maintain suit, it was said:

“The business which it transacted, as shown by the allegations, was to enter into a contract with the commission merchants to sell its buggies and phaetons on

I. J. Cooper Rubber Co. v. Johnson.

commission. . . . The selling of the buggies and phaetons, which was to be done by the commission merchants, was not a business done or carried on by the corporation. It was the business of the commission merchants themselves.”

The terms “factor” and “commission merchants” are said to be nearly or quite synonymous; the former expression being more common in the language of the law, and the latter in the language of commerce. A “factor” is one whose business it is to receive and sell goods for a commission, being intrusted with the possession of the goods to be sold, and usually selling in his own name. 1 Mechem on Agency, secs. 74, 2497, *et seq.*

While in one sense a factor or commission merchant is the agent of the consigning dealer or manufacturer, he does not conduct an agency or business for the latter at the place of business of the former, where the sales of the consigned merchandise are made to customers chosen by the local dealer, at his own risk, and the proceeds of the sale do not become the exclusive property of the consigning company. A business so conducted is truly said to be that of the factor or commission merchant.

A provision of the contract pointed to by appellee sureties as showing a doing of business in the State is one which makes it the duty of the tire company to insure the goods in its hands, as follows:

“Third. It is mutually agreed that the second party shall at all times cause the said merchandise in its

I. J. Cooper Rubber Co. v. Johnson.

possession to be, to the satisfaction of the first party, insured against fire in the name of the first party, to an amount not less than eighty per cent. of the value of said merchandise. It is further understood that the policies covering such insurance shall be made payable to, and deposited with, the first party, and that the cost of this insurance shall be borne by the second party.”

The incorporation of similar clauses in contracts of consignment is not unusual, and it has been held that it does not have the effect claimed by appellee, to constitute the local dealer a business agency of the foreign corporation; the latter therefore to be treated as doing business in the State. *Wasey v. Whitcomb*, 167 Mich., 58, 132 N. W., 572; *Three States Buggy etc., Co. v. Com.*, 32 Ky. Law Rep., 385, 105 S. W., 971; *Sturm v. Boker*, 150 U. S., 312, 14 Sup. Ct., 99, 37 L. Ed., 1093.

The power to insure the goods placed in his hands is one of the ordinary powers of a factor or of one selling on commission, imposable by contract or usage on the factor as such. 1 Mechem on Agency (2d Ed.), sec. 2521; 12 Am. & Eng. Enc. L. (2d Ed.), 656; *Wasey v. Whitcomb*, supra. Manifestly the provision had relation to and was in furtherance of the duty to care for, and in certain circumstances to return, the goods. The cost of the insurance was to be paid by the local dealer, not by the rubber company through it.

It is next said that the following contract provision works the result contended for:

“Eleventh. The second party agrees to, in behalf of the first party, make all adjustments with reference to

I. J. Cooper Rubber Co. v. Johnson.

sale of merchandise covered by this contract that may be necessary under the guaranty under which said merchandise was sold, in accordance with written instructions given to the second party by the first party from time to time; said adjustments to be made out of stock of tires, casings, and tubes belonging to the first party, and in possession of the second party, when necessary.”

These adjustments, we understand, are those required to be made to satisfy the ultimate consumer in respect of and under the guaranty of the quality of the merchandise. The guaranty aided the local dealer in selling the goods and this provision but enabled the latter to keep faith with his customer. Anything so done may be treated as an incident of the local dealer's business. We fail to see how it brought the rubber company within the purview of the statute as the possessor of goods within this State for the purpose of barter or sale, or constituted the tire company an agency for that purpose.

Another and distinct defense of appellees, sustained by the chancellor, was: That the rubber company had agreed with the tire company on a material change in the contract without their consent, with the result that as guarantors, or sureties on the bond, they were released from liability. It is insisted that, while the contract provided that monthly remittances should be made in cash, the tire company was permitted to fall behind in its payments, and that the rubber company accepted a note for one month's sales from the tire

I. J. Cooper Rubber Co. v. Johnson.

company, payable in thirty days, thus extending the time and operating a release of the sureties. This defense cannot be sustained.

“If a surety is liable for different payments, such as installments of rent, an extension of time as to one or more will not affect the liability of the surety for others.” 32 Cyc., 196.

When successive payments are to be made, at fixed periods, if the creditor gives time as to one of such payments he will release the surety as to it, but not with regard to subsequent payments. The receipt of the note could have no greater effect than a payment of the money, especially when received as here as cash, and the surety is not sought to be held liable thereon. *Klein v. Long*, 27 App. Div., 158, 50 N. Y. Supp., 419; *Cohn v. Spitzer*, 145 App. Div., 104, 129 N. Y. Supp., 104; *Shepard Land Co. v. Banigan*, 36 R. I., 25, 87 Atl. 531; 2 White & Tudor's Fed. Cas. (8th Ed.), 590.

We are of the opinion that the several defenses urged by the appellee are not maintainable, and that the chancellor erred in not decreeing in favor of the rubber company.

Reversed, with decree here.

GERMAN-AMERICAN MONOGRAM MFRS. v. E. B. JOHNSON.*

(*Nashville*. December Term, 1915.)

1. **SALES. Breach of contract. Remedy of buyer. Rescission.**

Where plaintiff, selling goods to defendant, represented that defendant was to handle the goods exclusively in his city, without which inducement the contract would not have been made, defendant's subsequent sale of the same goods to another dealer in that city was a breach of a material part of the contract, so that, regardless of whether there was fraud, the buyer was entitled to rescind. (*Post*, pp. 573-577.)

Cases cited and approved: *Landreth v. Schevenel*, 102 Tenn., 486; *Koerner v. Henn.*, 8 App. Div., 602; *Silberstein v. Guttridge*, 80 N. J. Law, 117.

2. **FRAUD. Representations. Expression of intention.**

A representation amounting to a mere expression of intention, though false, is not a fraud at law; but a representation amounting to an engagement binds the party making it to make it good. (*Post*, pp. 573-577.)

3. **SALES. Breach. Effect.**

A buyer may be discharged if there is a breach of the contract by the seller in some substantial particular which goes to the essence of the contract and renders the seller incapable of performance, or of performance as intended. (*Post*, pp. 573-577.)

4. **APPEAL AND ERROR. Harmless error. Instructions.**

In an action for the price of goods sold, where the verdict was manifestly reached on the ground that the buyer had a right to rescind, the charge of the trial court on the defense of set-off or recoupment, as to which no damages were shown upon which the verdict might have been reached, was not prejudicial. (*Post*, pp. 577, 578.)

*As to whether statements and promises regarding future are fraud, see notes in 25 L. R. A., 423; 10 L. R. A. (N. S.), 640; 24 L. R. A. (N. S.), 735.

Monogram Mfrs. v. Johnson.

5. SALES. Breach of contract. Remedy of buyer. Verdict. Sufficiency.

In such action, where the verdict for defendant on the ground of his right to rescind was correct, whether the jury attributed that right to the ground of fraud or to the defense that there was a breach of a material part of the engagement was immaterial. (*Post*, pp. 577, 578.)

FROM DAVIDSON

Appeal from the Circuit Court of Davidson County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—A. G. RUTHERFORD, Judge.

KNIGHT & BEASLEY and ALVIN McCARN, for plaintiff.

JAS. T. MILLER, for defendant.

MR. JUSTICE FANCHER delivered the opinion of the Court.

The suit is to recover for the price of certain monogram designs sold the defendant upon the express representation that the defendant should have the exclusive sale of these goods in the city of Nashville. The fact that Johnson was to handle the goods exclusively was a material element in the contract, and without which the contract would not have been made. The company breached this provision by selling the same goods to another dealer in the city of Nashville. De-

Monogram Mfrs. v. Johnson.

fenses were interposed by defendant that the account is not a just claim; that it is fraudulent and void; that it is without due consideration; and that defendant is not liable for said account, as plaintiff hath in its warrant alleged. The jury returned a verdict in favor of the defendant.

Upon appeal to the court of civil appeals, the case was reversed upon the ground that the trial court erred in submitting to the jury the right of Johnson to a set-off or recoupment; that court holding that Johnson had failed to prove his damages for the breach.

The main ground which has heretofore been urged in the court of civil appeals and in the petition for *certiorari* in this court is that the representation made to Johnson, upon which he was induced to purchase the goods in question, that he should have the exclusive sale of the goods, and the violation of that agreement, was a gross fraud practiced on defendant which should entitle him to a rescission.

It is urged by the plaintiff that the agreement not to sell to another dealer did not relate to an existing fact, but only to future sales, and is therefore no ground for avoiding the contract. As authority for this proposition, plaintiff cites *Landreth v. Schevenel*, 102 Tenn., 486, 52 S. W., 148, and other authorities in accord therewith.

In *Landreth v. Schevenel*, *supra*, it was held that misrepresentations in order to be fraudulent must be of facts at the time or previously existing, and not mere promises for the future, and therefore it was held

Monogram Mfrs. v. Johnson.

that rescission for fraud in procuring the settlement and compromise of the claims of a wholesale merchant against a retail merchant could not be predicated on the latter's failure to keep his promise to continue the business he was then conducting.

This is not exclusively a case where a defendant seeks to avoid payment on the ground of fraud because he has been induced to enter into the agreement by a promise for the future, but it is more proper to consider it upon another phase, namely, that plaintiff failed to carry out the undertaking or contract as agreed upon in a material part thereof, and for this reason the defendant refused to perform the contract on his part and offered to rescind.

There is a distinction between a representation which amounts to a mere expression of intention, which though false, is not a fraud at law, and a representation which amounts to an engagement. If the representation amounts to an engagement, the party making it is bound to make it good. Kerr on Fraud and Mistake, p. 89.

As a general statement of the law upon this subject, a buyer may be discharged if there is a breach of the contract by the seller in some substantial particular which goes to its essence and renders the defaulting party incapable of performance or makes it impossible for the defaulting party to carry it out as intended. 35 Cyc., 135.

On the subject of discharge by breach of contract, Elliott, in his work on Contracts, says:

Monogram Mfrs. v. Johnson.

“The breach may occur in any one of three ways; the party may renounce his liability under the contract, or he may by his own act make it impossible for him to fulfill his liabilities under the contract, or he may totally or partially fail to perform his promise. The first two forms of breach may take place while the contract is still executory and before performance can be legally demanded. The third form of breach can only take place at or during the time of performance. The effect of a breach of a contract by one party is to excuse performance by the other, and generally, but not always, to discharge the contract.” Elliott on Contracts, sec. 2025.

In section 2026, this author says:

“On breach of a contract the party not in default generally has the right to elect whether to terminate the contract or not, and he may exercise this right where such election does not increase the damages resulting from the breach.”

A case in point is as follows: In a suit to recover on the price of an advertising novelty, the contract under consideration stipulated as a part of the consideration of the purchase that the plaintiffs for a period of four months from the date of delivery would sell none of them in the city of Buffalo except to the defendant. Within thirty days from delivery of the property, the plaintiffs violated the agreement by selling the pictures to another party, and the defendant thereupon notified the plaintiffs that he rescinded the agreement and held the pictures subject to order. It was held that an exec-

Monogram Mfrs. v. Johnson.

utory agreement which is entire may, upon a substantial breach by one of the parties, be rescinded for that reason by the other when it can be done *in toto* and the parties put *in statu quo*. The contract was considered executory, and a part of the consideration of the purchase was the plaintiffs' stipulation that they would not, within such terms, give opportunity to any other person in the city of Buffalo, by sale to him, to come in competition with the defendant in the use of the advertising novelty; that plaintiffs disabled themselves from performance on their part, of the contract, in a respect which may have been deemed material to the beneficial purpose of the purchase; and when plaintiffs did, by such sale to another, deny to the defendant the benefit of that provision, he was at liberty to treat such sale as a substantial breach of the contract, prejudicial to him, and on that ground to rescind it, if he was then able to fully restore to the plaintiffs what he had received from them. *Koerner v. Henn*, 8 App. Div., 602, 40 N. Y. Supp., 1021.

In another case a wholesale dealer, the plaintiff in the action, sold to the defendant, a hardware dealer, twelve dozen razors under a contract containing a stipulation that the plaintiff would insert an advertisement in an Atlantic City newspaper, which advertisement should contain the name of the defendant as the selling agent of the razors for that town in the hardware trade, and that all inquiries to the plaintiff should be referred to the defendant. In an action to recover the price of the razors, the defendant offered evidence to show that the

Monogram Mfrs. v. Johnson.

plaintiff had during the period covering the contract with defendant sold such razors at a less price than was permitted defendant in his contract with plaintiff. It was held that the provision amounted to a contract that the defendant should be the exclusive agent for the plaintiff and an offer of this testimony should have been allowed. *Silberstein v. Guttridge*, 80 N. J. Law, 117, 77 Atl., 792.

We are of opinion that the verdict of the jury can well be sustained upon the ground that the representation made by the agent of plaintiff that the defendant should have the exclusive sale of the goods sold to him in the city of Nashville was a part of the engagement entered into between the parties, and that, regardless of whether there was fraud, it was such material part of the contract as that the future breach thereof would entitle the defendant to a rescission.

It appears that, as soon as the defendant ascertained the fact that plaintiff had sold the same goods to another dealer in the city, he promptly offered to rescind and immediately shipped the goods back to plaintiff, except a small amount which he had sold. For the portion sold he paid the plaintiff.

We do not attribute the verdict of the jury to the defense of set-off or recoupment, because no damages were proven upon which the verdict could have been reached, and therefore the charge of the trial judge on that question was not prejudicial. The verdict manifestly was reached upon the ground that there was a

Monogram Mfrs. v. Johnson.

right to rescind, and whether the jury attributed that right to the question of fraud, or to the defense that there was a breach of a material part of the engagement, is immaterial. The correct result was reached.

The writ of *certiorari* is granted. The judgment of the court of civil appeals is reversed, and judgment of the trial court affirmed.

Walmsley v. Franklin County.

H. A. WALMSLEY *et al* v. FRANKLIN COUNTY *et al*.

(*Nashville*. December Term, 1915.)

1. STATUTES. Titles. Plurality of subjects. Validity.

Constitution article 2, section 17, provides that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title. Pub. Acts 1913, ch. 26, was entitled "a general enabling act authorizing counties through their quarterly courts to issue bonds for highway purposes to provide for a retiring indebtedness thus created at or before maturity, and to provide for the expenditures of the fund derived from the bond issue." Section 16 of that chapter was amended by Pub. Acts 1915, ch. 23, to read that nothing in the act shall be construed to repeal or modify any private or special act authorizing any county or municipality through its county court to issue bonds for the purpose of building roads. Pub. Acts 1913, ch. 26, sec. 3, provides for the issuance of bonds when necessary to secure federal co-operation on the roads. Section 6 makes it the duty of the county trustees to collect and account for taxes, and to take advantage of all laws to force the collection of the tax levied to retire the bonds. Section 12 provides that, if all the roads provided for in the enactment are finished, and there is a surplus, it shall be expended as the road commissioners direct. *Held*, that the act did not violate the constitutional provision requiring but one subject. (*Post*, pp. 582, 583.)

Acts cited and construed: Acts 1913, ch. 26; Acts 1915, ch. 23.

Cases cited and approved: Railroad v. Byrne, 119 Tenn., 299; State v. Brown, 103 Tenn., 449; Morrell v. Fickle, 71 Tenn., 79; State v. Hamby, 114 Tenn., 364; Cannon v. Mathes, 55 Tenn., 504; Frazier v. Railroad Co., 88 Tenn., 157; Scott v. Marley, 124 Tenn., 398 Todtenhausen v. Knox Co., 132 Tenn., 169.

Constitution cited and construed: Sec. 17, art. 2.

Walmsley v. Franklin County.

2. STATUTES. Subjects. Plurality of subjects.

All the provisions of such act being intended to further its general subject, the improvement of county roads, the act did not violate the constitutional provision requiring that the subject of the act be stated in the title. (*Post*, pp. 583-586.)

Cases cited and approved: Cannon v. Mathes, 55 Tenn., 504; Luehrman v. Taxing District, 70 Tenn., 426; Morrell v. Fickle, 71 Tenn., 79; Frazier v. Railroad, 88 Tenn., 156; Cole Mfg. Co. v. Falls, 90 Tenn., 469; State v. Yardley, 95 Tenn., 554; Peterson v. State, 104 Tenn., 131; Condon v. Maloney, 108 Tenn., 99; Furnace Co. v. Railroad Co., 113 Tenn., 697; Scott v. Marley, 124 Tenn., 398.

3. COUNTIES. Powers of county board. Regular sessions.

Under Pub. Acts 1913, ch. 26, sec. 1, providing for the improvement of county roads, and Pub. Acts 1915, ch. 23, the 1913 act requiring the issuance of bonds by the county courts in quarterly session assembled, the county courts may issue bonds at a specially called meeting under Shannon's Code, sec. 5997, providing that the chairman or judge of the county court shall have power to convene the quarterly courts in special session. (*Post*, pp. 586, 587.)

Code cited and construed: Sec. 5997(S.).

4. COUNTIES. Highway bonds. Time of redemption.

Under Pub. Acts 1913, ch. 26, sec. 1, providing that highway bonds shall mature at such time as determined by the county court, not exceeding forty years from the date of issuance, redeemable at the option of the county at such times as fixed by the court, a resolution of the county court fixing the time and maturity of the bonds in forty years, was valid, since it fixes a definite date of maturity. (*Post*, pp. 587, 588.)

5. COUNTIES. Highway bonds. Notice. Statutory requirements.

The provision of Pub. Acts 1913, ch. 26, sec. 2, requiring that the orders and resolutions of the county courts directing issuance of highway bonds shall be preceded by at least thirty days by the adoption of a resolution setting forth the roads to be built

Walmsley v. Franklin County.

or improved, and published as a notice to the voters, is mandatory, and compliance may be enforced before the adoption and issuance of the bonds, but, where no objection is made until after the issuance of the bonds, the bonds are not invalid for failure to comply therewith. (*Post*, pp. 588, 589.)

FROM FRANKLIN

Appeal from the Chancery Court of Franklin County.—FOSS H. MERCER, Chancellor.

T. L. STEWART and T. A. EMBREY, for appellants.

FLOYD ESTILL, ARTHUR CROWNOVER, GEO. E. BANKS, JESSIE B. TEMPLETON and J. J. LYNCH, for appellees.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

The bill was filed to enjoin the issuance of bonds by the county in the sum of \$350,000 for highway purposes. Defendants demurred to the bill, the chancellor sustained the demurrer and dismissed the bill, and complainants appealed.

The grounds for relief made in the bill are twofold: First, that the act under authority of which the county proposed to issue the bonds was unconstitutional and void; second, that if the act be valid the defendants have not proceeded in accord with its provisions in certain respects in the bill set out. The act in question is chapter 26 of the first extra session of the general

Walmsley v. Franklin County.

assembly of the year 1913. See page 477, Public Acts 1913. This act was amended by chapter 23, Acts of 1915. See Public Acts 1915, page 67. The substance of the amendment is as follows:

“But nothing in this act shall be construed to repeal or modify any private or special act authorizing any county or municipality in this State through its county court, or other authority, to issue bonds for the purpose of building roads in such said counties or municipalities.”

The first point made upon the constitutionality of the act is that it violates that part of section 17, art. 2, of the State constitution, which provides:

“No bill shall become a law which embraces more than one subject, that subject to be expressed in the title.”

We think the general object or purpose disclosed by the body of the act is expressed in the title, and that purpose is to enable counties in this State to issue bonds for highway purposes. Undoubtedly, when the scheme of the act is examined, a number of agencies and instrumentalities are apparent, but it is clear that each and all of these are employed in the body of the act to advance the general purpose of the act. It has been held that:

“When a statute has but one general object or purpose, the subject is single, however multitudinous may be the means or instrumentalities provided for effecting that purpose.”

Walmsley v. Franklin County.

See *Railroad v. Byrne*, 119 Tenn. (11 Cates), 299, 104 S. W., 460; *State v. Brown*, 103 Tenn. (19 Pick.), 449, 53 S. W., 727; *Morrell v. Fickle*, 71 Tenn. (3 Lea), 79; *State v. Hamby*, 114 Tenn. (6 Cates), 364, 84 S. W., 622; *Cannon v. Mathes*, 55 Tenn. (8 Heisk.), 504; *Frazier v. Railroad Co.*, 88 Tenn. (4 Pick.), 157, 12 S. W., 537; *Scott v. Marley*, 124 Tenn. (16 Cates), 398, 137 S. W., 492; *Todtenhausen v. Knox Co. et al.* (Tenn.), 177 S. W., 487.

Appellants insist that section 3 of the act in question expresses a purpose not within the purview of the title of the act. We are unable to assent to this view. Section 3 provides:

“If the federal government should at any time propose to supply the service of a federal engineer, and, in addition appropriate a specified sum of money for the construction or improvement of highways in any county in this State, the quarterly court of such county is hereby authorized to appropriate for the purpose a sum not exceeding double that contributed by the federal government; and if there be not funds in the treasury sufficient to meet this appropriation, then, without submission to a vote of the people, the quarterly (county) court of such county is authorized to issue bonds for the amount required to make good the appropriation: Provided, such bonds issued shall not in the aggregate exceed 3 per cent. of the taxable values of such county, which may be either in a single order or successive orders, as the court may determine.”

Walmsley v. Franklin County.

That section does not introduce into the body of the act a new subject. Its object is to enable counties in this State to issue bonds for highway purposes in cases where the federal government shall become active in the manner indicated. The activity of the federal government and the activity of the quarterly county court in conjunction with such aid as may be received from the federal government are mere agencies or instrumentalities within the scheme of the act to forward its general purpose, of enabling counties in this State, through their quarterly county courts, to issue bonds for highway purposes. This view is supported by the fact that whether the county issues bonds under sections 1 and 2 of the act, or under section 3 of the act, the same agency in either case acts for the county. That agency is the quarterly county court, and, whether bonds be issued under section 3 or sections 1 and 2, the product of the agency provided under each of these sections is the same. The product is county bonds, and county bonds issued for highway purposes.

Appellants next insist that the last clause of section 6 of the act introduces into its body a separate and distinct subject not germane to the general purpose of the act. This insistence, we think, has no merit. The last clause of section 6 makes it the duty of the county trustee to take advantage of all laws on the statute books to force the collection of the tax which section 6 provides shall be levied for the purpose of taking care of the interest on bonds issued under the act, and for the purpose of creating a sinking fund for the retire-

Walmsley v. Franklin County.

ment of the bonds at maturity. The remaining provisions in the last clause of section 6 all relate to the general purpose expressed in the body of the act.

It is next insisted for appellants that section 12 introduces into the body of the act a subject not germane to its general purpose. This section provides, in substance, that after all the roads named in the resolution have been graded and macadamized for their full length, if a surplus of the fund for which the bonds have been sold remains on hand, it shall be expended on such other road or roads not set forth in the resolutions as, in the judgment of the road commissioners, will serve the greatest number of people anywhere within the county. This is an application of the proceeds of the bonds to highway purposes, and germane to the general purpose of the act, certainly not incongruous therewith, and permissible under the following of our cases: *Cannon v. Mathes*, 55 Tenn. (8 Heisk.), 504; *Luehrman v. Taxing District*, 70 Tenn. (2 Lea), 426; *Morrell v. Fickle*, 71 Tenn. (3 Lea), 79; *Frazier v. Railroad*, 88 Tenn. (4 Pick.), 156, 12 S. W., 537; *Cole Manufacturing Co. v. Falls*, 90 Tenn. (6 Pick.), 469, 16 S. W., 1045; *State v. Yardley*, 95 Tenn. (11 Pick.), 554, 32 S. W., 481, 34 L. R. A., 656; *Peterson v. State*, 104 Tenn. (20 Pick.), 131, 56 S. W., 834; *Condon v. Maloney*, 108 Tenn. (24 Pick.), 99, 65 S. W., 871; *Furnace Co. v. Railroad Co.*, 113 Tenn. (5 Cates), 697, 87 S. W., 1016; *Scott v. Marley*, 124 Tenn. (16 Cates), 398, 137 S. W., 492.

Walmsley v. Franklin County.

In our opinion, there is no merit in any of the questions made upon the constitutionality of the act.

Under the second ground of relief on which the bill is predicated the point is made that by the first section of the act authority to issue bonds was conferred on the county courts of the various counties in the State when in quarterly session assembled; a quorum being present and a majority thereof voting in the affirmative. This authority, appellant insists, could only be exercised when the body above named was in regular session; whereas, the resolution of the county court to issue the bonds in the present case was passed at a special or called meeting of the county court in quarterly session assembled.

In response to this objection it is to be noted that the act does not in terms require the authority to be exercised at a regular meeting of the county court in quarterly session. Section 5997, Shannon's Code, provides:

“The chairman or judge of the county courts of this State shall have power to convene the quarterly courts in special session when, in his opinion, the public necessities require it, or upon the application to him, in writing, of any five justices, members of said court, so to do.”

The transcript shows that the judge of the county court of Franklin county made the call, as required by the terms of the section above named, and it appears that the notice of the call required by section 5998 of Shannon's Code was published in accord with the re-

Walmsley v. Franklin County.

quirements of that section. We think, under a proper construction of the act in question, that the power conferred could be legally exercised at a called or special quarterly session of the county court.

The next insistence for appellants is that the bonds authorized to be issued under the act—

“are to be redeemable at the option of the said county, and that it is mandatory on the county, under the provisions of said act, to fix a time for the redemption of the said bonds, and failure to so fix a time is vital and renders the resolution and election void.”

The above-quoted insistence is based on the following language of section 1 of the act, where, referring to the bonds, it is said:

“They shall mature at such time as the court may determine, not exceeding forty years from date of issuance, and be redeemable at option of the county at such time or times as the court may fix.”

The resolution which was passed authorizing the issuance of the bonds, after fixing the amount of the issue and the denomination of each bond, and the rate of interest which each was to bear, provided further, “And to mature in forty years from date of issuance,” from which it appears to us that the county court, acting for the county, deemed it best not to fix an earlier date than forty years for the redemption of the bonds. The court, for the county, exercised the discretion and judgment which the act expressly committed to them, and therefore there is no merit in the above contention.

Walmsley v. Franklin County.

It is next said for appellants:

“The last paragraph of section 2 of the said act provides that the orders and resolutions of the county court directing the issuance of bonds under this act ‘shall be preceded by at least thirty days by the adoption of the resolution setting forth the roads to be built or improved.’ This resolution was incorporated in the same resolution directing the issuance of bonds and calling the election.”

Appellants insist that the failure of the county court to adopt the resolution required by the last clause of section 2 of the act is a clear limitation upon the power of the county court to make a bond issue, and therefore that the same is void. We think the requirement of the last clause of section 2 is mandatory, and that the county court could have been required by *Mandamus* to proceed in accordance with the mandatory requirement of that clause, but, as shown by appellants’ insistence above quoted, the resolution required by the last clause of section 2 was published for the length of time required, and was incorporated in the resolution of the quarterly county court directing the issuance of the bonds, subject to the result of the election. The manifest purpose of the last clause of section 2 was: First, to give notice to the members of the county court of “the roads to be built or improved, naming the starting and ending points, the general course, and approximate number of miles thereof;” second, to give the same notice to the people of the county interested in the proposed action.

Walmsley v. Franklin County.

While it is our opinion that the last clause of section 2 imposed a mandatory duty upon the county court to comply therewith for the purposes above set out, yet, construing the act as a whole, we do not think it was the purpose of the general assembly that the bonds issued should be invalid, where, as in this case, the resolution for issuance of the bonds was voted for by a majority of the members of the quarterly county court, and the required majority of voters at the election voted in favor of issuance of the bonds. The act does not provide that a failure to give the notice shall invalidate the bonds; moreover, the last clause of section 2 of the act was a mere matter of grace extended by the general assembly to the classes of persons for whose benefit it was inserted. The legislature had the power to grant the authority in question without making the validity of the action of the county court dependent on an election by the voters of the county, or the giving of such notice. No constitutional right of the voters or of the members of the county court was invaded by failure to give the notice.

We have disposed, in detail, of each of the contentions made by appellant. We think there is no merit in any of them; wherefore the decree of the court below is affirmed at appellants' cost.

McKay v. Railroad.

VAL MCKAY v. LOUISVILLE & NORTHERN RAILROAD COMPANY *et al.*

(Nashville. December Term, 1915.)

1. CERTIORARI. Scope of review. Petition. Assignments of error. Necessity.

Under Acts 1907, ch. 82, creating the court of civil appeals and regulating the method of reviewing its judgments, on petition by defendant for *certiorari* to review the opinion and judgment of the court of civil appeals, which on some questions was favorable to the defendant and against the plaintiff, plaintiff, who presented no petition for *certiorari* and no assignment of errors, was concluded by the court's rulings adverse to him. (*Post*, p. 595.)

Acts cited and construed: Acts 1907, ch. 82.

Cases cited and approved: C., N. O. & T. P. R. R. Co. v. Brock, 132 Tenn., 477; Knight v. Cooley, 131 Tenn., 21; Murrell v. Rich, 131 Tenn., 378.

Code cited and construed: Sec. 4637(S.).

2. CONTRACTS. Construction. Intention of parties.

The object in the construction of contracts is to ascertain the intention of the parties and what the contract means as a whole. (*Post*, pp. 595, 596.)

Case cited and approved: Arbuckle v. Kirkpatrick, 98 Tenn., 221.

3. CONTRACTS. Construction. Relation of parties.

In the construction of contracts, courts will look to the nature of the subject-matter, the relation of the parties to the contract, and the object to be accomplished. (*Post*, pp. 595, 596.)

McKay v. Railroad.

4. CARRIERS. Limiting liability. Express company's employees. Contracts of employment.

A contract, whereby plaintiff, then employed as a messenger by an express company, entered into a contract with the express company containing the words "have entered or am about to enter," for a continued future employment, agreeing to the express company's contract to save defendant railroad harmless from all liability to the company's employees for any injury on defendant's line, whether caused by negligence of defendant or otherwise, and ratifying its contracts with carriers when accepted by the express company, initiated a new term of employment, so as to constitute a good consideration for the plaintiff's contract. (*Post*, pp. 596, 597.)

5. CARRIERS. Contract limiting liability. Reading contract. Effect.

In such case, plaintiff, in the absence of any fraud practiced upon him by the express company in procuring the contract, was bound thereby, whether he did or did not read the contract when he signed it. (*Post*, pp. 597, 598.)

6. CARRIERS. Express messenger. Release of carrier's liability. Effect.

Plaintiff, who by contract with an express company for employment as messenger assumed the risk of injury, and released his claims against carriers for liability for personal injury and ratified the company's contracts with carriers, and agreed to save the company harmless as to any claims for personal injury, and who received the employment as a consideration, was bound by his contract. (*Post*, pp. 597, 598.)

Cases cited and approved: *Railroad Co. v. Stone & Haslett*, 112 Tenn., 348; *Railroad Co. v. Smith*, 123 Tenn., 678.

7. CARRIERS. Passenger. Express messenger.

Under such contract of employment, the employee, injured by wreck on defendant's line, did not stand to the defendant in the relation of a passenger, so as to make defendant liable for his injury. (*Post*, pp. 598-608.)

 McKay v. Railroad.

~~Cases~~ cited and approved: New York C. R. Co. v. Lockwood, 17 Wall., 357; Grand Trunk R. Co. v. Stevens, 95 U. S., 655; Liverpool & G. W. Steam Co. v. Phoenix Ins. Co., 129 U. S., 397; Denver & R. G. R. Co. v. Whan, 11 L. R. A., 432; Coleman v. Penn. R. Co., 50 L. R. A., 432; Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Bros. Construction Co., 228 U. S., 177; Robinson v. Baltimore & Ohio R. Co., 237 U. S., 84; Oliver v. Northern P. R. Co. (D. C.), 196 Fed., 432.

Cases cited and distinguished: Baltimore & Ohio S. W. Ry. Co. v. Voight, 136 U. S., 498; Purdy v. R. W. & O. R. R. Co., 125 N. Y., 209; Runt v. Herring, 2 Misc. Rep., 105.

8. CONTRACTS. Public policy. Release of right to recover for personal injury.

Such contract, in respect to plaintiff's surrender of his right of action against the carrier for personal injury in consideration of his employment by the express company, was not void as against public policy. (*Post*, pp. 598-608.)

 FROM DAVIDSON

Appeal from the Circuit Court of Davidson County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—A. G. BATHERFORD, Judge.

JNO. T. ALLEN, for plaintiff.

CHAS. C. TRABUE and F. M. BASS, for defendants.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

The case is pending on *certiorari*. The writ has been granted and argument allowed. It is a suit for dam-

McKay v. Railroad.

ages for personal injuries sustained while plaintiff, in the discharge of his duties as a messenger for the Southern Express Company, was riding in an express car, part of a passenger train operated by the defendant railroad company. The train was wrecked, and the injuries to plaintiff resulted.

To the declaration averring the negligent operation of the train as the cause of the wreck and consequent injuries to plaintiff, the railroad company, by way of defense, interposed its plea of the general issue, and, in addition thereto, a special plea, as was its right under section 4637, Shannon's Code. This special plea admitted that the defendant was a corporation and common carrier on and prior to the date of the injury to plaintiff, but averred that on said date there was in force between it and the Southern Express Company a contract, by the terms of which it was agreed between the parties that the railroad company would furnish, for the use of the express company in the transaction of its business, cars to be hauled by the railroad company on its line, to be used for the transportation of express matter, and to be occupied by employees of said express company in charge of such express matter, such employees to be transported in said express cars free of charge by the railroad company, and that the express company should protect and hold harmless the railroad company from all liability that the railroad company might incur, or be under to the employees of the express company for

McKay v. Railroad.

any injuries such employees might sustain while being transported by defendant over its line, whether such injuries were caused by the negligence of the railroad company or its employees, or otherwise, and that pursuant to said contract the railroad company did furnish to the express company cars known as express cars, and one of these was occupied by plaintiff as express messenger at the time plaintiff sustained the injuries on which this suit is based; plaintiff being in said express car as custodian of express matter therein being transported. The plea then averred the execution by plaintiff of the contract, the material parts of which are set out on the margin of this opinion.¹

To meet this special plea, plaintiff filed a replication in which it was averred that the said accident release was executed by him without consideration, inasmuch as he was at the time it was signed already in the employ of the express company, and was given no new or different contract of employment, and further that the contract was against public policy, and for this reason void. Other matters were averred in the replication which need not be set out for reasons later appearing herein.

The company demurred to the replication. The trial judge sustained the demurrer. Plaintiff declined to plead over, whereupon his suit was dismissed, and he prosecuted his appeal.

¹ See note at end of case.

McKay v. Railroad.

By the judgment of the court of civil appeals it was held that the replication was sufficient, and, accordingly, it reversed the judgment of the circuit court and remanded the cause for further proceedings.

The petition for *certiorari* seeks a review of the opinion and judgment of the court of civil appeals. Upon some questions made by the replication the opinion of the court of civil appeals was favorable to the railroad company and against the plaintiff. The latter has presented no petition for *certiorari* and no assignment of errors, and is therefore concluded by the rulings adverse to it made by the court of civil appeals on the points referred to above. See *C., N. O. & T. P. R. Co. v. Brock*, 132 Tenn. (5 Thomp.), 477, 178 S. W., 1116; *Knight v. Cooley*, 131 Tenn. (4 Thomp.), 21, 173 S. W., 435; *Murrell v. Rich*, 131 Tenn. (4 Thomp.), 378, 412, 175 S. W., 420; chapter 82, Acts of 1907.

The court of civil appeals was in error in its construction of the legal effect of the accident release contract. In the construction of contracts the object is to ascertain the intention of the parties, and the important question is what the contract means as a whole. Paige on Contracts, vol. 2, sec. 1112; *Arbuckle v. Kirkpatrick*, 98 Tenn. (14 Pick.), 221, 39 S. W., 3, 36 L. R. A., 285, 60 Am. St. Rep., 854. Courts will look to the nature of the subject-matter, the relation of the parties to the contract, and the object sought to be accomplished. Paige on Contracts, vol. 2, sec. 1123. There is no need in this case to resort to extrinsic evi-

McKay v. Railroad.

dence in the construction of the contract. Its terms are wholly free from ambiguity.

The contract begins as an application for employment and contemplates a term *in futuro*, but the applicant does not ask for a term for any particular length of time. He is content that the company may have the right to terminate the future term at its pleasure, and he agrees to all of the terms thereafter set out, and that all his representations are for the purpose of procuring employment with the company. He then makes certain representations about himself, and thereafter agrees to execute a bond for the protection of the company, and then affixes his signature to his application. The conclusion is irresistible that this application looked to a future employment as contradistinguished from one which existed when the application was made, and it follows that a term existing when the application was made was extinguished by acceptance of the offer made by the applicant. Such acceptance ended the pre-existing employment, and initiated the new one contemplated by the application. This view is strengthened by other parts of the contract presently to be noticed. The next part of the contract is the accident release.

It is manifest that the words "have entered, or am about to enter," in the first clause of the accident release part of the contract, are intended to cover, on the one hand, the case of an applicant who, at the time of his application, was in the service of the company under a former contract of employment, which the

McKay v. Railroad.

applicant intended to come to an end by the acceptance of his offer to make a new contract, and, on the other hand, those words were intended to cover the case of an applicant who had not heretofore been employed by the company. The signature of the applicant affixed to this part of the contract completed his offer. The next and final part of the contract is the acceptance of the applicant's offer by the company.

The signature of the company to the last portion of the contract ended the old contract and completed the new one. Its signature was a definite acceptance of the offer of the applicant to enter into the new and to abandon the old contract relations. By this completed contract, in the absence of an averment in his replication of fraud practiced upon him by the express company in the procurement of the contract, the plaintiff is undoubtedly bound in law, whether he read the contract or not, at the time he affixed his signature thereto. *Railroad Co. v. Stone & Haslett*, 112 Tenn. (4 Cates), 348, 79 S. W., 1031; *Railroad Co. v. Smith*, 123 Tenn. (15 Cates), 678, 134 S. W., 866. Plaintiff stipulated for employment of a certain kind, and employment of that kind he received from the company. The consideration for the rights which he surrendered by the terms of the contract was the employment received, and the law does not allow that he shall deny the consideration, ignore his contract, and reassert and recover under his surrendered rights, after having enjoyed the benefits for which he contracted, and which he received, as the result of his contract.

McKay v. Railroad.

Upon the question of consideration, it is immaterial whether plaintiff stipulated for a term of service to be extinguished at the pleasure of his employer or at a fixed time *in futuro*. The material fact is that he received what he contracted for, and what he received was of value in the eye of the law. Our conclusion therefore is that the contract was binding upon him, unless public policy avoids it.

Therefore the next question is whether the relationship of common carrier and passenger existed between the railroad company and plaintiff at the time he sustained his injuries. Many State courts of last resort had answered this question in the negative in passing upon cases involving facts and contracts like this, or closely analogous to it, prior to the decision in *Baltimore & Ohio S. W. Ry. Co. v. William Voight*, 176 U. S., 498, 20 Sup. Ct., 385, 44 L. Ed., 560. The question was also answered in the negative in the case last named. The contract involved in that case was in substance the same as the one involved here, and there, as here, the action was by an express messenger, and against a railroad company. The question certified in that case, after stating the material facts and the terms of the contract, was as follows:

“Does said railroad company assume, towards such express messenger while being carried in the course of his said employment in one of said express cars attached to a passenger train of said railroad company, pursuant to the contracts aforesaid, the ordinary liability of a common carrier of passengers for hire so

McKay v. Railroad.

as to render said railroad company liable as such to said express messenger, notwithstanding the contracts aforesaid, for injuries he might sustain by reason of a collision between the train to which said express car is attached and another train of said railroad company, caused by the negligence of employees of the railroad company?"

The opinion of the court, after referring to *New York C. R. Co. v. Lockwood*, 17 Wall., 357, 21 L. Ed., 627; *Grand Trunk R. Co. v. Stevens*, 95 U. S., 655, 24 L. Ed., 535; *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S., 397 (9 Sup. Ct., 469); 32 L. Ed., 788—held that while the principles declared in the cases above referred to were salutary, and the court had no disposition to depart from them, yet it was not to be forgotten that the right of private contract was no small part of the liberty of the citizen, and that the usual and most important function of courts of justice was rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appeared that such contracts contravened public right or public welfare. The opinion continues:

"It was well said by Sir George Jessel, M. R., in *Printing & N. Registering Co. v. Sampson*, L. R., 19 Eq., 465: 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and compe-

McKay v. Railroad.

tent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider; that you are not lightly to interfere with this freedom of contract.' "

It was further said in the opinion that the agreements created a very different relationship between Voight and the railway company from the usual one between passengers and railroad companies. It was pointed out that Voight was under no stress as a passenger desiring transportation from one point to another on the railroad; that his occupation of the car especially adapted to the uses of the express company was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the express company and, said the opinion:

“He was on the train, not by virtue of any personal contract right, but because of a contract between the companies for the exclusive use of a car. His contract to relieve the companies from any liability to him, or to each other for injuries he might receive in the course of his employment, was deliberately entered into as a condition of securing his position as a messenger.”

The opinion then points out the distinction between the *Voight Case* and the *Lockwood Case*.

What has been said about the case last commented on fairly indicates the view taken of the question by

McKay v. Railroad.

decisions which had preceded that case, and by decisions which have followed it and approved its reasoning. Very elaborate notes discussing the cases on this subject will be found accompanying *Denver & R. G. R. Co. v. Whan*, 11 L. R. A. (N. S.), 432, and *Coleman v. Pennsylvania R. Co.*, 50 L. R. A. (N. S.), 432.

The great weight of authority evidently supports the view that the relationship is not that of passenger and carrier in cases analogous on their facts to the present case and the *Voight Case*. In those jurisdictions where, under similar contracts and facts, a contrary ruling is found, it is generally rested upon some peculiar constitutional or statutory provision. An opinion by the supreme court of the United States approving the doctrine of the *Voight Case* is to be found in *Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Bros. Construction Co.*, 228 U. S., 177, 33 Sup. Ct., 474, 57 L. Ed., 787, and a later case by the same court is *Robinson v. Baltimore & Ohio R. Co.*, 237 U. S., 84, 35 Sup. Ct., 491, 59 L. Ed., 849. In the case last named the contract involved was between the Pullman Company and one of its porters. The latter sued the railway company for injuries sustained while the porter was in the discharge of his duty on the Pullman car, resulting from a collision caused by the negligence of the defendant. The defense was based on a contract between the porter and the Pullman Company similar in import to that under consideration in the present case. The court held it to be clear that unless the contract was condemned by statute it was valid, and

McKay v. Railroad.

was a bar to plaintiff's recovery, citing the *Voight Case* and *Santa Fe, P. & P. R. Co. v. Grant Bros. Construction Co.*, supra. The statute relied on as destroying the validity of the contract was section 5 of the Employer's Liability Act of April 22, 1908, 35 Stat. at L. 66, ch. 149 (U. S. Comp. St. 1913, sec. 8661), which provides that any contract, the purpose or intent of which shall be to enable any common carrier to exempt itself from liability created by this act, shall to that extent be void. But the court held that the Pullman porter was not an employee of the defendant railroad company within the meaning of that statute, and it was also held that the relationship between the railroad company and the Pullman Company was not one of co-proprietorship, and on this point the opinion cites *Oliver v. Northern P. R. Co.* (D. C.), 196 Fed., 432.

Upon the foregoing authorities, we think it clear that the contract set up by the special plea was founded upon a sufficient consideration, was not opposed to public policy, and was a bar to the judgment sought by the plaintiff. The only case cited by the court of civil appeals to sustain its construction of the contract is *Purdy v. R. W. & O. R. R. Co.*, 125 N. Y., 209, 26 N. E., 255, 21 Am. St. Rep., 736. In respect of the release which the baggageman in that case signed, the New York court, in its opinion, said:

“ ‘He simply signed the contract, and the defendant kept on employing the plaintiff as baggageman;’ in other words, continued the already existing employment.”

McKay v. Railroad.

The language above quoted distinguishes the *Purdy Case* from the present one, for here, as we have held, the parties terminated the old and created a new contract, of which new contract the accident release was a part. The *Purdy Case* was referred to in a later New York case. *Runt v. Herring*, 2 Misc. Rep., 105, 21 N. Y. Supp., 244. The court, in that opinion, said:

“The recital of the employment and the dollar paid distinguishes the case from *Purdy v. Rome, etc., R. Co.*, 125 N. Y., 209 (26 N. E., 255, 21 Am. St. Rep., 736), and probably discloses a sufficient consideration to sustain the agreement.”

It results that the judgment of the court of civil appeals is reversed, and the judgment of the circuit court is affirmed.

NOTE.

“Contract.

“Application for Employment with Southern Express Company.

“I hereby apply for employment by the Southern Express Co., and agree that my employment, if I am employed by the said company, shall not be for any particular length of time, and that the said company reserve to itself the right to terminate the contract at pleasure, and I agree to all of the terms and conditions hereinafter set out, and all of the statements hereinafter made, are made as representations for the purpose of procuring employment with said company.”

McKay v. Railroad.

“Accident Release.

“Whereas, I, the undersigned, have entered, or am about to enter, the employment of the Southern Express Company, and in the course of such employment may be required to render services in the care, carriage, or handling of merchandise and property in course of transportation by cars, vessels and vehicles, belonging to the different railroad, stage and steamboat lines upon which the company relies for its means of forwarding property delivered to it to be forwarded;

“And whereas, such express company, under its contracts with many of the corporations and persons owning or operating such railroad, stage and steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employees:

“Now, therefore, in consideration of the premises and of my said employment I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employee of any such corporation or person, or otherwise, and whether resulting in my death or otherwise.

“And I do hereby agree to indemnify and save harmless the Southern Express Company of and from any and all claims which may be made against it at any

McKay v. Railroad.

time by any corporation or person under any agreement which it has made, or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation, or of any employee of any person or corporation, or otherwise.

“And I hereby bind myself, my heirs, executors and administrators with the payment to such express company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

“I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning or operating the railroad, stage or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all claims, demands, and causes of action, arising out of such injury, or connected with or resulting therefrom.

“I do hereby ratify all agreements heretofore made by said express company with any corporation or persons operating any railroad, stage and steamboat line in which such express company has agreed in substance that its employees shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be

McKay v. Railroad.

bound by each and every of such agreements in so far as the provisions thereof relative to injuries sustained by employees of the company are concerned, as fully as if I were a party thereto. .

“And I do hereby authorize and empower said express company, at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporation or persons operating any railroad, stage or steamboat line, for my transportation as a messenger or employee free of charge, upon the condition and consideration that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons, or of any employee of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

“And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation and of all persons upon whose railroad, stage or steamboat lines the Southern Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons.

“I further agree in consideration of my employment by said Southern Express Company, that I shall assume all risks of accident or injury which I shall meet

McKay v. Railroad.

or sustain in the course of such employment, whether occasioned by the negligence of said company, or any of its members, officers, agents, or employees, or whether occasioned by the negligence of any railroad, steamboat or canal company, or stage company with which the said express company may be in such contractual relations, or by the agents, servants, or employees of any such company, or otherwise; and that in case I shall at any time suffer any such injury, I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury or connected therewith, or resulting therefrom; and I hereby bind myself, my heirs, executors, and administrators with the payment to said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith. I do expressly declare that while traveling over any of the lines of railway, or stageroad, or steamboat routes, or while being about to so travel for the said Southern Express Company, the relation of passenger and carrier will not exist between me and such carrier, but my rights upon such lines shall exist solely because of my employment with the said Southern Express Company.

“Witness my hand and seal this 23d day of June nineteen hundred and seven.

“ (Sign name in full)

VALENTINO MCKAY.

McKay v. Railroad.

“Note.—If applicant is under age his guardian must also sign this release.

“_____, Parent or Guardian.

“In the presence of: G. M. FISHER. Ra.”

“Contract of Employment.

“On the statements and conditions contained in the foregoing application the Southern Express Company hires the applicant above named to serve as messenger, and to perform such other services as may be directed from time to time; from June 23, 1907, and agrees to pay him for his services at the rate of (agreed upon, or to be agreed upon, for such employments to which the applicant may be assigned from time to time),—dollars per month, or fractional part thereof, while occupying such position, or until the date of his resignation or discharge.

“Dated at Nashville, Tenn., 8/23, 1907.

“SOUTHERN EXPRESS COMPANY,

“By C. M. FISHER, Ra.

“VALENTINO MCKAY, Employee.”

“Witness: C. M. FISHER.”

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1915.

**JOHN W. GREEN V. OFFICERS AND DIRECTORS OF KNOX-
VILLE BANKING & TRUST CO.***

(Knoxville. September Term, 1915.)

1. BANKS AND BANKING. Officers and directors. Liability to bank. Action. Premature character.

A bill was prematurely brought at the chancellor's direction by the receiver of an insolvent bank against its officers and directors to recover for loans negligently made by them, whereby the insolvency was brought about, where the debtors were not wholly insolvent when suit was brought, but collections might yet be made from them, since there can be no recovery for negligence without damages resulting therefrom, but it would be otherwise where such insolvency existed. (*Post*, pp. 614-618.)

Cases cited and approved: Johnson v. Churchwell, 38 Tenn., 146; Allison v. Coal Co., 87 Tenn., 63; Jackson v. Meek, 87 Tenn., 69; Albitztigui v. Guadalupe, etc., Mining Co., 92 Tenn., 600; Wallace v. Lincoln Savings Bank, 89 Tenn., 630.

2. EQUITY. Pleading. Demurrer.

Demurrer to the bill as a whole which is not good to the whole must be *held bad in toto*. (*Post*, pp. 614-618.)

*On the question of liability of Bank directors in case of bad loans or investments, see notes in 55 L. R. A., 762; 39 L. R. A. (N. S.), 173.

Green v. Officers & Directors of Trust Co.

3. BANKS AND BANKING. Officers and agents. Liability to bank. Negligence as to loans..

A bill filed at the instance of the chancellor by the receiver of an insolvent bank to recover of officers and directors for loans negligently made was maintainable although the assets of the bank were not first exhausted, since the suit was by the bank itself, i. e., by its receiver in its right, to hold its agents, the directors, liable for negligence, and the measure of damages was the amount of the negligent loans finally lost after due efforts to collect. (*Post*, pp. 614-618.)

4. EQUITY. Pleading. Disregard of foreign matter.

Foreign matter contained in a pleading must be disregarded on demurrer. (*Post*, pp. 614-618.)

5. BANKS AND BANKING. Officers and agents. Right of action. Immaterial matter.

The right of action of the receiver of an insolvent bank at the instance of the chancellor to recover of officers and directors for loans negligently made was not impaired by the fact that, if all the assets in the receiver's hands should be realized and the whole demand made against the directors be successfully prosecuted, there would not be enough assets produced to satisfy the bank's debts, since the bank, owning the rights sued on, was entitled to collect not only for the payment of creditors but for distribution among stockholders. (*Post*, pp. 618, 619.)

6. ACTION. Misjoinder of causes of action. Parties involved.

A bill by the receiver of an insolvent bank at the instance of the chancellor to recover of officers and directors for loans negligently made was not bad for misjoinder of parties complainant on the ground that it was substantially one by creditors and stockholders to enforce their respective rights against the directors, while a right of action of creditors is *ex delicto*, depending on intentional fraud or willful mismanagement, and that of stockholders is based on contract, sustainable by proof of gross negligence alone, since the suit was in legal effect by the bank itself. (*Post*, pp. 619-621.)

Code cited and approved: Secs. 2086, 2104 (S.).

Green v. Officers & Directors of Trust Co.

7. BANKS AND BANKING. Officers and agents. Liability to bank. Action. Pleading.

The allegations of a bill by the receiver of an insolvent bank at the instance of the chancellor against its officers and directors to recover for fraud, willful mismanagement, and negligence bringing about the insolvency, that the defendants carried as solvent large assets in fact insolvent, published false statements, carried as cash items tickets, miscellaneous papers, and overdrafts which would be lost to the bank through insolvency, that the directors were guilty of negligence in permitting officers to extend to themselves a heavy line of credit and to lend to concerns in which they were personally interested large amounts of money, which would prove nearly a total loss, all of which could have been prevented by the directors by the exercise of ordinary diligence, were sufficient to justify overruling a demurrer, since to make a case against the directors it was unnecessary to allege they were guilty of fraud and willful mismanagement, the allegations of negligent conduct being sufficient, though allegations showing fraud and willful mismanagement would have been proper. (*Post*, pp. 621-623.)

Cases cited and approved: *State v. Standard Oil Co.*, 120 Tenn., 86; *Wallace v. Lincoln Savings Bank*, 89 Tenn., 630.

Codes cited and construed: Secs. 2067, 2068 (S.).

8. BANKS AND BANKING. Officers and agents. Liability to bank at common law.

Under the common law a bank itself has the right to redress for injuries inflicted upon it by the acts denounced by Shannon's Code, sections 2067, 2068, and 3242, providing that intentional fraud in failing to comply with the articles of incorporation, or in deceiving the public or individuals in relation to their liabilities, subjects all officers, stockholders, or directors, knowingly participating therein, to damages at the suit of any person injured; that the diversion of the funds of the banks, the payments of dividends leaving insufficient funds to meet its liabilities, the keeping of false books or accounts, whereby any one is injured, and the making and publishing of false reports, are such frauds as

Green v. Officers & Directors of Trust Co.

will subject those actively concerned to damages at the suit of any person injured; and that any director of any bank who shall be guilty of any fraud or willful mismanagement by which loss shall fall upon its creditors shall be individually liable for such loss. (*Post*, pp. 623, 624.)

9. EQUITY. Pleading. Multifariousness.

A bill by the receiver of an insolvent bank filed at the instance of the chancellor against its officers and directors to recover for loans negligently made, which joined directors who served five full terms and those who served only a part of such five terms, was multifarious as to the short term defendants, though the defendants who served during all the terms could not object that the others were included with them for any period of time within the years during which they served, as they were connected with each of all the defendants in some part of the litigation. (*Post*, pp. 624, 625.)

10. EQUITY. Pleading. Multifariousness.

Whether a bill should be declared multifarious is largely a matter of discretion controlled by considerations of the inconvenience to the parties and the court of permitting the examination of disconnected controversies in the same litigation. (*Post*, pp. 625-628.)

Cases cited and approved: Insurance Companies v. Confectionery Co., 124 Tenn., 247; Emerson v. Gaither, 103 Md., 564; Wallace v. Lincoln's Savings Bank, 89 Tenn., 630; Briggs v. Spaulding, 141 U. S., 132.

11. EQUITY. Pleading. Demurrer.

The allegations of a bill must be taken as true by the appellate court on hearing to review a decree dismissing the bill on demurrer. (*Post*, p. 628.)

12. EQUITY. Pleading. Demurrer.

Every reasonable presumption must be indulged in favor of a bill when opposed by a demurrer. (*Post*, p. 628.)

Green v. Officers & Directors of Trust Co.

13. BANKS AND BANKING. Officers and agents. Liability to bank. Action. Pleading.

A bill by the receiver of an insolvent bank, filed at the instance of the chancellor, to recover against its officers and directors for loans negligently made, did not need to set out the particular circumstances of each loan, showing the situation and surroundings of the parties, since all complainant was required to do was to make a *prima facie* case of negligence. (Post, pp. 628, 629.)

14. EVIDENCE. Judicial Notice. Banking custom.

The court will judicially know that in Tennessee the duty to make loans does not ordinarily devolve on the directors of a bank. (Post, pp. 629, 630.)

15. BANKS AND BANKING. Officers and agents. Liability to bank. Action. Pleading.

In suit by the receiver of an insolvent bank at the instance of the chancellor to recover against its officers and directors for loans negligently made, the fact that a large number of items catalogued in the bill as cash items and overdrafts were undated did not render the bill demurrable as to defendants who served five full directorates, the period sued for; it being alleged that the items occurred during such period. (Post, pp. 630, 631.)

FROM KNOX

Appeal from the Chancery Court of Knox County.—
R. H. SANSOM, Special Chancellor.

GREEN, WEBB & TATE and WRIGHT & JONES, for appellant.

JAMES B. WRIGHT, SHIELDS & CATES, L. H. SPILMAN, LINDSAY, YOUNG & DONALDSON and JOHNSON & COX, for appellee.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

It appears from the bill that the receiver was appointed by the chancellor in a suit heretofore brought by the creditors and stockholders of the Knoxville Banking & Trust Company to wind it up as an insolvent concern. It also appears that by an order entered in that case the receiver was directed to file the present bill against the officers and directors. Its purpose was to hold them liable for fraud, willful mismanagement, and negligence whereby the beforementioned insolvency was brought about and the bank utterly ruined. Twenty-four grounds of demurrer were filed, all of which were overruled by the chancellor except the last, and as to his action upon the latter no appeal has been prosecuted to this court. The complainant, however, has appealed from the decree dismissing his bill upon the twenty-three grounds referred to.

It will be unnecessary for us to consider these grounds of demurrer in detail, presenting as they do very many attacks upon the bill from various angles. The counsel in their briefs have practically agreed upon the chief questions presented, and to these we shall in the main confine our attention, only referring to the demurrers themselves where it may be necessary to render our views, or the reasons for our decision, more clear.

The first ground is that the action is premature. We do not think this objection is well taken.

Green v. Officers & Directors of Trust Co.

It is true the bill concedes that a considerable percentage may be collected from some of the large loans alleged to have been improvidently made, and now in part insolvent; and it must follow that the extent of the liability of defendants for these cannot be ascertained until such special matters are settled by exhaustion of the debtors, yet that need not delay the bringing of suit to recover from the directors as to those loans, improvidently made, if they are otherwise liable, where the debtors have been exhausted or it has been lawfully made to appear that they are insolvent, that is, that the corporation has suffered loss in respect of these matters by reason of the negligence of the defendants. The bill states many instances in which loans, alleged to have been improvidently made, were, at its filing, wholly insolvent; indeed, wholly insolvent when made.

The cases of *Johnson v. Churchwell*, 1 Head (38 Tenn.), 146, *Allison v. Coal Co.*, 87 Tenn., 63, 9 S. W., 226, *Jackson v. Meek*, 87 Tenn., 69, 72, 73, 9 S. W., 225, 10 Am. St. Rep., 620, and *Albitztigui v. Guadalupe, etc., Mining Co.*, 92 Tenn., 600, 603, 22 S. W., 739, cited by defendants, do not apply.

In *Johnson v. Churchwell* the action was against the directors of a bank under certain provisions of its charter, to hold them personally liable, on certain circulating notes issues of the bank, alleged to have been over-issues, on the ground that they had violated the terms of the charter in making such issues, and that the bank having failed, leaving the notes unre-

Green v. Officers & Directors of Trust Co.

deemed, and its refusal to pay them having been made on demand, the plaintiffs were injured to the extent of the face of the notes. The court held there could be no action brought under the charter to recover the amount of the notes until there had been a prior judicial determination of the violation of the charter, and likewise until there had been an exhaustion of the assets of the bank. As to the latter point, it was said that the measure of the liability of the directors would be the amount which the assets of the corporation would fall short of discharging its liabilities, caused by the defendants' dereliction. Of course, it is true, as we have already intimated, that the present suit is premature as to those alleged improvident loans that are not wholly insolvent, but out of which collections may yet be made. This results, not from what may be held in any given case or authority, but from the fact that the basis of the liability of the directors, in a case of the kind before us, is negligence, and there can be no recovery without injury or damage resulting from the negligence, and this cannot be ascertained as to certain loans mentioned until the borrowers under the loans have been exhausted. But in the case before us hundreds of improvident loans are alleged, very many of which are charged to have been insolvent and uncollectible at their inception, and ever since. As to such loans there is no question of waiting for an exhaustion of the debtors. It is true that a special demurrer directed to those special parts of the bill in which it is alleged that collections are yet to be antici-

Green v. Officers & Directors of Trust Co.

pated from certain loans, on the ground that as to these the bill is premature, would be bound to be successful; but there is no such demurrer. On the contrary, the demurrer is to the bill as a whole, and not being good to the whole must be held bad *in toto*. The theory of the demurrer seems to be that the suit is premature because the assets of the corporation were not first exhausted. This objection is necessarily altogether inapplicable, because this suit is one by the corporation itself, that is, by its receiver, in right of the corporation, to hold its agents, the directors liable for negligence, and the measure of damages is the amount of the alleged negligent loans finally lost after due efforts to collect, that is, if the directors are liable at all, under the facts stated in the bill. There are, it is true, some allegations in the bill, to which we shall later refer, quite unusual in, if not inapplicable to, a bill of the corporation or its receiver, and generally appearing only in a suit filed directly by creditors, themselves; but, in any event, such matters cannot change the controlling fact that the present bill was filed pursuant to the order of the chancellor, made in an insolvency proceeding instituted in the chancery court by creditors and stockholders for the purpose of winding up the corporation. The bill, in its essential nature, then, is a bill by the corporation to hold its directors liable (*Wallace v. Lincoln Savings Bank*, 89 Tenn. [5 Pick.], 630, 634, 635, 15 S. W., 448, 24 Am. St. Rep., 625), and can lawfully contain only matters fit for such a pleading. All foreign matter contained

in it must be disregarded. The bill being one of the kind just indicated, of course no contention can be made that the assets of the corporation must be exhausted as a preliminary to their collection, as this would be a patent contradiction both in word and act.

Allison v. Coal Co., supra, is a case substantially similar to *Johnson v. Churchwell*. The case of *Jackson v. Meek*, supra, rests on the same principle. There an effort was made by an employee to hold the stockholders of a corporation liable, under a charter provision, for wages unpaid by the latter, and it was held that such a suit would not lie until the assets of the corporation had been exhausted. The case of *Albitz-tigui v. Gaudalupe, etc., Mining Co.*, supra, stands on the same general ground. There an effort was made by the creditors to compel the shareholders and directors of a corporation to pay the amount of debts incurred in excess of the corporate stock, and it was held the suit could not be maintained because it appeared there were plenty of assets on hand to pay all of the debts.

The present bill, anticipating the defense of prematurity, alleges that if all of the assets already in the receiver's hands shall be realized, and likewise the whole demand made against the directors be successfully prosecuted, still there will not be enough produced to satisfy even the debts. We do not think this fact is material, as the defendants correctly insist, because, since the rights sued on, so far as applicable to the frame of the bill, belong to the corporation, it

Green v. Officers & Directors of Trust Co.

would, through its receiver, be entitled to collect, if its demands are well based, first for the payment of creditors, and next for distribution among the stockholders. The allegation, however, is pertinent to another aspect of the case, under which it is contended, in support of one of the demurrers, that the bill cannot be maintained for the benefit of stockholders, since it does not appear there were any stockholders other than the defendants themselves, and the court would not collect from them money to be immediately returned to them.

There being, as already indicated, no demurrer directed solely to those parts of the bill seeking a recovery in respect of loans not wholly insolvent, the bill must for the present stand as to these matters along with the rest, and the question in respect of such matters can hereafter arise only on objections made to the testimony that may be offered to show damages accrued in respect of them, unless in the course of the proceedings facts may develop showing that pending the present suit, before closing the account, the debtors referred to have been exhausted, so that the damages arising may be shown.

The next question is whether there was a misjoinder of parties complainant. This must be answered in the negative.

It is insisted for defendants that the bill is substantially one filed by creditors and stockholders as such to enforce their respective rights against the directors; that the right of action of the former is

ex delicto, depending on proof of "intentional fraud or willful mismanagement," while the latter is based on contract, and may be sustained by proof merely of gross negligence. As we have previously indicated, the suit is in legal effect an action by the corporation itself. There is only one complainant, the receiver of the corporation. The allegation is many times repeated that the defendants were guilty of "fraud and willful mismanagement;" but there are also allegations of simple negligence and numerous instances stated, involving in the aggregate many thousands of dollars, wherein the defendants "made and caused to be made" loans which were wholly insolvent at the time they were made, so continued, and were total losses to the corporation. It is also alleged that the defendants failed to make the stated examinations required by law (Shan. Code, secs. 2086, 2104), and thus failed to exercise due supervision over the officers; that too much power and control over the business of the bank had been committed to the officers of the bank, the president, cashier, and assistant cashier, who had committed frauds, which could have been detected by the directors by the exercise of reasonable diligence, but which they failed to exercise; and that by these frauds the bank was hastened to insolvency. Among the acts of fraud alleged against the officers, indeed against all of the defendants, are carrying as solvent large assets which were in fact insolvent, the publishing of false statements, the carrying, as cash, items involving a great many thou-

Green v. Officers & Directors of Trust Co.

sands of dollars, which were not cash, but "tickets," miscellaneous papers, and overdrafts, practically all of which will be lost to the bank, through insolvency; that among these there is a "cash ticket" against the president, W. H. Gass, for \$3,081.05, a draft paid for the cashier Willis of \$531, cash tickets against him for \$5,533.30, a stock certificate brought for him, \$400, in the Knoxville Auto & Garage Company, a concern of doubtful solvency, an overdraft of the said Gass for \$5,138.32, an overdraft of the said Willis for \$5,937.26, and another against him of \$3,420.70. It is alleged that the defendant directors were guilty of negligence in permitting these officers to extend to themselves such a line of credit; that the defendants were guilty of other negligence in permitting the said officers Gass and Willis to lend to certain concerns in which they were personally interested very large sums of money, running into thousands of dollars, viz., to the McCormick Furniture Company, the Vine Street Furniture Company, S. M. Beaumont Company, Knoxville Auto & Garage Company, Tennessee Medicine Company, Picture Plays Theater Company, and Bonita Theater Company; that these loans will prove nearly a total loss; and that all could have been prevented by the directors by the exercise of ordinary diligence.

The foregoing constitute sufficient allegations of negligence on the part of the directors to justify overruling the demurrer. *State v. Standard Oil Co.*, 120 Tenn., 86, 108, 110 S. W., 565; *Wallace v. Lincoln Savings Bank*, 89 Tenn., 630, 652, 653, 15 S. W., 448, 24

Green v. Officers & Directors of Trust Co.

Am. St. Rep., 625; 10 Cyc., 831, 832, 833. To make a case against the directors it was unnecessary to allege that they were guilty of fraud and willful mismanagement, though surely they would be liable to the corporation for injury to its assets or business caused by such conduct on their part; the allegation of negligence was enough, still, if there were facts showing fraud and willful mismanagement causing injury, it was proper that such matters should be likewise presented in the bill.

Rights of action of the latter kind, however, under statutes to be presently noticed, are especially intended to furnish a means of direct relief to creditors, and all others suffering injury by the conduct referred to, through actions brought by them against directors or officers or stockholders. These rights of action are secured to such persons by Shannon's Code, secs. 2067 and 2068, which are as follows:

“2067. Intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their liabilities, subjects all officers, stockholders, or directors, knowingly participating therein, to the penalties of a misdemeanor, and, moreover to damages at the suit of any person injured thereby.

“2068. The diversion of the funds of the corporation to other objects than those mentioned in the incorporation; the payment of dividends which leave insufficient funds to meet the liabilities of the corporation; the keeping of false books or accounts whereby any

Green v. Officers & Directors of Trust Co.

one is injured; and the making and publishing of false reports, are such frauds as will subject those actively concerned therein to the penalties of the preceding section."

Another guaranty of safety is given creditors in section 3242, which reads:

"Each stockholder in any of the banks of this State shall be individually liable for any loss sustained by the creditors of the institution, to the amount and value of his stock, until he has paid the same in full, on his original subscription. And if any director or directors of any of the banks in this State shall be guilty of any fraud or willful mismanagement of the affairs of such bank, by which any loss shall be occasioned to its creditors, such director or directors, upon legal ascertainment of the fact, shall be individually liable for such loss, and all the stockholders assenting thereto shall be liable in like manner."

But without regard to the statutes referred to, and without dependence on them, we repeat, the corporation itself would under the common law have the right to redress for any injuries inflicted upon it by any of the acts denounced by these statutes.

Therefore the allegations of "fraud and willful mismanagement," along with the allegations of negligence, do not make the bill a direct proceeding by creditors and stockholders, or by either. Indeed, the origin of the bill was such as necessarily to make it a bill by the corporation through its receiver, its filing having

Green v. Officers & Directors of Trust Co.

been directed by the chancellor in the insolvency proceeding in which the receiver was appointed.

It is next insisted that the bill is multifarious, and we think this contention is well taken.

It sets out the names of the several boards of directors between the years of 1908 and 1912, and inclusive of those years, and shows the date of the service of each individual director.

It appears that the following served during all the years mentioned: J. W. Hope, Joseph Knaffl, Charles H. Smith, W. H. Gass, W. T. Newton and Charles J. McKinney.

The following served only from January 16, 1908, to January 12, 1909, viz: S. A. Lackey.

The following served from January 16, 1908, to January 12, 1909, and from the latter date to January 11, 1910, viz: William Brakebill.

The following served from January 16, 1908, to January 12, 1909, and from the latter date to January 11, 1910, and from the date last mentioned to January 10, 1911, viz: James R. Wooldridge.

The following served from January 12, 1909, to January 11, 1910, and from the latter date to January 10, 1911, and from the date last mentioned to January 9, 1912, viz: G. J. Ashe.

The following served from January 11, 1910, to January 10, 1911, and again from January 9, 1912, till the failure of the bank in the latter part of the year, viz: Charles H. Bacon.

Green v. Officers & Directors of Trust Co.

The following served from January 12, 1909, to January 11, 1910, and from the date last mentioned to January 10, 1911, and from that date to January 9, 1912, and from that date to the failure of the bank; that is, during all of the years except the first year, or from 1909 to the end, viz.: N. B. Kuhlman and Arthur Groves.

The following served only from January 9, 1912, to the failure of the bank, viz.: H. G. Hutchinson.

It is frequently a very difficult question to determine whether a bill should be declared multifarious; indeed, it is largely a matter of discretion, controlled by considerations of the inconvenience to the parties and to the court of permitting the examination of disconnected controversies in the same litigation. Gibson's Suits in Chancery (2d Ed.), sec. 149; Id., sec. 284; *Insurance Companies v. Confectionery Co.*, 124 Tenn., 247, 267-289, 136 S. W., 915, 34 L. R. A. (N. S.), 897.

We think it clear that it would be unjust to the defendants S. A. Lackey, William Brakebill, Charles H. Bacon and H. G. Hutchinson to continue them in a bill with those who served during all of the five terms, and on the remand hereinafter ordered permission will be given to file separate bills against the parties named without additional process pursuant to the authority granted the court in Shannon's Code, section 6136. As to the defendants who have served during all the five terms, they cannot object that others are

Green v. Officers & Directors of Trust Co.

included with them for any period of time covered by the years during which they served, since they would be connected with each one of all the defendants in some part of the litigation. The bill can therefore stand as to them. *Emerson v. Geither*, 103 Md., 564, 64 Atl., 26, 8 L. R. A. (N. S.), 738, 7 Ann. Cas., 1114. As to Mr. Wooldridge, who served during three of the terms, Mr. Ashe, who likewise served through three, and Messrs. Kuhlman and Groves, who served through four of the five terms, we think there would be little practical inconvenience in permitting their cases to remain with those of Hope, Knaffl, and others who served during all the terms.

The foregoing substantially covers all of the questions made by the demurrers, so far as they can affect the disposition of the case here; but there are some questions which have been argued that we think should be referred to, and our views stated, for the guidance of the parties, and of the chancellor when the case comes to a hearing on the issues made.

The first of these is the measure of duty incumbent upon directors in this State. Without discussion this matter, we say that we firmly adhere to the rules laid down on this subject in *Wallace v. Lincoln's Savings Bank*, 89 Tenn., 630, 15 S. W., 448, 24 Am. St. Rep., 625, and thoroughly agree with and follow the opinion of the supreme court of the United States in *Briggs v. Spaulding*, 141 U. S., 132, 11 Sup. Ct., 924, 35 L. Ed., 662. These cases are in substantial accord.

Green v. Officers & Directors of Trust Co.

It is insisted in behalf of the defendants that under the by-laws the directors were authorized to appoint a finance committee, and that such a committee was appointed and served during the whole time; that on this committee was devolved the duty of making loans and investments. The allegations of the bill upon this subject are as follows:

“On January 16, 1908, the defendants J. W. Hope, Joseph Knaffl, and W. H. Gass were elected as a finance committee of the board of directors, and these defendants have since said date served as said committee; that is, having held that position by election, they, as will more fully be alleged hereinafter, have inefficiently and negligently performed the duties which ought to have been performed by said committee, and have failed to perform duties which should have been performed by said committee, and have been guilty of fraud and willful mismanagement in law as such. . . .

“Your complainant would further show that the defendants Joseph Knaffl, J. W. Hope, and W. H. Gass, were by the other defendants constituted a finance committee, and the finance committee also was incumbered with the duty of inspecting the affairs of the said banking institution, and knowing of its transactions, and of reporting them in detail to the directors; and the directors likewise were incumbered with this duty, and were furthermore incumbered with the duty of seeing that the finance committee performed its duty; and the defendants all wholly failed in all

Green v. Officers & Directors of Trust Co.

these respects, and all of said willful mismanagement and negligence resulted in the above set out and still other losses to the creditors and stockholders of said banking institution.”

Upon this hearing we must receive as true the allegations of the bill. We cannot therefore go into the consideration of how far the directors might rely upon the finance committee’s performing its duty, or how far they would be relieved of looking into the transactions of the bank by reason of the existence of such a committee.

It is insisted that the defendant directors did not make the loans complained of; but, however the facts may be, the bill alleges they did make the loans, and caused them to be made, and we must at this time accept this as the true statement of the facts, in considering the bill and demurrer. An argument is made construing the expressions “made and caused to be made” and “made and permitted to be made” as equivalent simply to an allegation that the directors permitted the loans to be made. This would not be a correct method of construing a bill when opposed by a demurrer, the rule being that every reasonable presumption must be made in favor of the bill. *State v. Standard Oil Co.*, supra.

It is said that there is no sufficient allegation of facts to support the charge of fraud and willful mismanagement, or even of negligence. We have already adequately considered this matter. We shall notice however, in this immediate connection a further point

Green v. Officers & Directors of Trust Co.

made in the defendant's brief, to the effect that the particular circumstances of each loan are not set out, showing the situation and surroundings of the parties that would rightly move the discretion of any one making a supposed loan. This is not necessary. All that the complainant need do is to make a *prima facie* case of negligence, and this we think has been done. It is true this *prima facie* case may be met by the defendants showing qualifying circumstances that will completely overturn the charge of negligence either by showing that under all the circumstances the loans were properly made, or under the facts as they appeared to the parties at the time.

At this point we deem it proper to say that in deciding this case we have rested specially upon the allegation that the directors themselves made the loans, and caused them to be made. We judicially know that as a rule this duty is not ordinarily in this State devolved on directors; but, since the bill alleges that these acts were undertaken by the directors, we must accept it as true, and what we have written must be construed in the light of this fact. There is another branch of the inquiry, however, to which we direct attention. That is, the allegations of the bill already referred to that the defendants failed to make the examinations which the statute requires to be made every six months, and that if such examinations had been made the improvident conduct of the officers and of the finance committee would have been discovered, from time to time, and much of it prevented from hap-

Green v. Officers & Directors of Trust Co.

pening thereafter. This is an element of negligence distinct from that charged in respect of making and causing to be made the several hundred loans complained of; so that, in case the allegations of the bill should not be sustainable upon the subject of making and causing to be made, the loans, there yet remains the allegation of negligence based on the want of due examination and oversight.

There are a large number of items catalogued in the bill under the head of cash items, or items carried as cash, and overdrafts. All of these are without date. A demurrer is based on this fact. Such demurrer, however, could not be good as to those of the defendants who served during the whole time, for it is alleged that these items occurred during the period sued for; and there is no demurrer filed separately by either of the defendants who are left in the bill, and whose terms of service do not cover the whole time. However, this is not material since we have held that as to these latter, viz., Wooldridge, Ashe, Kuhlman, and Groves, no inconvenience sufficiently grave will be experienced to justify the court, under the theory of multifariousness, in separating these defendants from the main current of the litigation. Their rights in respect of these matters can be sufficiently preserved by exceptions to evidence offered in respect of the items referred to, in so far as dates are not furnished, as showing such items applicable to the periods during which the several defendants last named served as directors.

Green v. Officers & Directors of Trust Co.

The result of the whole matter is that all of the demurrers will be overruled, except those based on the ground of multifariousness, and these will be sustained so far as concerns the defendants S. A. Lackey, William Brakebill, Charles H. Bacon, and G. H. Hutchinson. A decree will also direct the cause to be remanded to the court below, to the end that issues may be made as to the other defendants, and with leave to complainant to file separate bills without new process as to the said four parties last named.

The costs of the appeal will be divided equally between the complainant and the defendants other than the last four named; these latter will pay no costs.

Johnson City v. Eastern Electric Co.

JOHNSON CITY v. TENNESSEE EASTERN ELECTRIC COMPANY.

(*Knoxville*. September Term, 1915.)

1. PLEADING . Demurrer.

Defenses not appearing on the face of complainant's bill cannot be taken advantage of by defendant in its demurrer. (*Post*, pp. 634-637.)

2. STATUTES. Enactment. Veto by executive. Effect of "Adjournment."

Constitution article 3, section 18, provides in part that if the governor shall fail to return any bill with his objections within five days (Sundays excepted) after presentment to him, it shall become a law without his signature, unless the general assembly, by adjournment, prevents its return, in which case it shall not become a law. *Held*, that "adjournment," as used, means final adjournment of both houses, though as the word is generally used it may be intended to signify either a temporary or a final adjournment, so that a bill which was held by the Governor for thirty-three days before its return vetoed, for thirty days of which both houses of the general assembly were adjourned temporarily pursuant to joint resolution, became a law, as it might have been returned during adjournment within five days with veto to an agent of the house of representatives, in which the bill originated, such as the clerk. (*Post*, pp. 637-651.)

Cases cited and approved: *McNeil v. Commonwealth*, 12 Bush. (Ky.), 727; *Miller v. Hurford*, 11 Neb., 377; *State v. Michel*, 52 La. Ann., 936; *Harpending v. Haight*, 39 Cal., 189; *Corwin v. Comptroller*, 6 S. C. 390; *Hequembourg v. City of Dundirk*, 49 Hun., 550; *People v. Hatch*, 33 Ill., 135; *State v. South Norwalk*, 77 Conn., 257.

Code cited and construed: Secs. 227, 230 (S.).

Johnson City v. Eastern Electric Co.

Constitution cited and construed: Sec. 18, art. 3 (1870). Sec. 21, art. 4 (1848).

3. STATUTES. Enactment. Veto by executive. Return of bill.

A return of a bill by the governor, with his objections thereto in writing, made to the committee on enrolled bills of the house of origin or to any member thereof, is a good return of the bill and objections within constitution article 3, section 18, providing that the governor's failure to return the bill with objections within five days, Sundays excepted, after presentment to him, causes it to become a law without his signature, unless adjournment of the general assembly prevents such return. (*Post*, pp. 637-651.)

4. STATUTES. Enactment. Return by Governor. Statute. "Adjournment."

Shannon's Code, sections 227-230, touching the procedure in regard to bills after enrollment, does not amount to a construction of a Constitution article 3, section 18, providing that failure of the governor to return a bill within five days after presentment to him, shall cause it to become a law without his signature, unless return is prevented by adjournment, in conflict with the construction in the section of "adjournment" as meaning "final adjournment." (*Post*, pp. 651-654.)

Acts cited and construed: Acts 1871, ch. 139.

Code cited and construed: Secs. 227-230 (S.).

Constitution cited and construed: Sec. 18, art. 3; Sec. 11, art. 2.

FROM WASHINGTON

Appeal from the Chancery Court of Washington County.—HAL. H. HAYNES, Chancellor.

Johnson City v. Eastern Electric Co.

THAD A. COX, for appellant.

GEO. C. SELLS, for appellee.

FRANK M. THOMPSON, Attorney-General, for the State.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

The original bill was filed herein by the city of Johnson City, claiming certain rights under House Bill No. 19 of the general assembly of 1915, and predicating said rights upon the enactment of said bill into law, according to the requirements of the constitution. The Tennessee Eastern Electric Company demurred, the chancellor overruled the demurrer and decreed that House Bill No. 19 was a law, and that complainant was entitled to the writ of *mandamus* sought by its supplemental bill. The Electric Company appealed and has assigned errors in this court.

We need not discuss the second and third assignments of error. They are predicated on the existence of certain defenses which do not appear on the face of complainant's bill, and which defendant cannot have advantage of by demurrer. The only matter available to defendant under its demurrer was its assault on the validity of House Bill No. 19. A copy of that bill is as follows:

Johnson City v. Eastern Electric Co.

“House Bill No. 19.

“(Mr. Barnes). An act to authorize the president and secretary of the State board of education to certify expenses for lighting the State Normal at Johnson City, and to provide for the payment of such expenses.

“Section 1. Be it enacted by the general assembly of the State of Tennessee that the president and secretary of the State board of education be and they hereby are authorized and directed to certify to the comptroller of the treasury the necessary expenses for lighting the State Normal School at Johnson City from the final passage of this act, provided that payment for current shall not exceed five cents per kilowatt hour.

“Sec. 2. Be it further enacted, that the comptroller of the treasury shall disburse the moneys for the expenses so certified in the manner prescribed by law for the disbursement of money to charitable institutions.

“Sec. 3. Be it further enacted that this act take effect from and after its passage, the public welfare requiring it.

“Passed March 30th, 1915.

“WILLIAM P. COOPER,

“Speaker of the House of Representatives.

“ALBERT E. HILL,

“Speaker of the Senate.”

Johnson City v. Eastern Electric Co.

Appearing under above is the notation:

“This bill vetoed by the governor, and veto sustained by the house of representatives.”

The following is a copy of a message from the governor addressed to the speaker of the house of representatives setting out the objections of the governor to House Bill No. 19:

“To the speaker of the house of representatives. I am returning House Bill No. 19 without my approval, for the reason that the contract made and entered into by and between Johnson City and the State Board of education expressly provided that free lights and water would be furnished the school in the event the same was located at that place. Therefore the furnishing of lights free to this school was a part of the consideration agreed to be paid by Johnson City, for the location of the same.

“TOM C. RYE, Governor.

“May 4, 1915.”

House Bill No. 19 originated in the house and passed the house and senate in all respects as required by the provisions of section 18 of article 2. It was then signed by the respective speakers in open session, and the fact of such signing noted on the journal. The date of its passage in the house was March 30, 1915. It was then presented to the governor, and this occurred on April 1, 1915. The bill remained in the hands of the governor continuously from the last above date to May 4, 1915, on which day his excellency returned the bill to the house in which it originated with his objections

Johnson City v. Eastern Electric Co.

to it in writing set out *supra*. The house failed again to pass the bill, notwithstanding the objections of the executive.

On April 3, 1915, both houses of the general assembly, by joint resolution adjourned, not *sine die*, but to meet again on May 3, 1915, on which latter date that body again assembled pursuant to adjournment.

From the foregoing it is apparent that excluding the day the governor received the bill and including the day it was returned with his objections to the house in which it originated, this bill was continuously in his hands for the space of thirty-three days. Under the facts which are not in dispute the controversy between the parties is narrowed to a single question. What is meant by "adjournment" in section 18, art. 3, of our constitution?

At this point two rival contentions arise. First, appellant insists that, under section 18, article 3, of our constitution of 1870, the return of a bill with his objections thereto in writing, which is required to be made by the governor, if he refuse to sign it, must be made to the house in which the bill originated, at a time when there is present in that house a quorum of its members competent to a reconsideration of the bill or other transaction of legislative business. Second, appellee insists that such return may be made to some officer, agent, or employee of the house chargeable, within the meaning of the constitution, with the duty of placing before the house for its reconsideration, the returned bill, and the objections of the governor there-

Johnson City v. Eastern Electric Co.

to, whether a quorum of the membership of the house be present or not at the time the bill with the objections of the governor be placed in the hands of the officer, agent, or employee of the house.

Section 18 of article 3 is as follows:

“Every bill which may pass both houses of the general assembly, shall before it becomes a law, be presented to the governor for his signature. If he approve, he shall sign it, and the same shall become a law; but if he refuse to sign it, he shall return it with his objections thereto, in writing, to the house in which it originated; and said house shall cause said objections to be entered at large upon its journal, and proceed to reconsider the bill. If after such reconsideration a majority of all the members elected to that house shall agree to pass the bill notwithstanding the objections of the executive, it shall be sent with said objections, to the other house, by which it shall be likewise reconsidered. If approved by a majority of the whole number elected to that house, it shall become a law. The votes of both houses shall be determined by yeas and nays, and the names of all the members voting for or against the bill shall be entered upon the journals of their respective houses. If the governor shall fail to return any bill, with his objections within five days (Sundays excepted) after it shall have been presented to him, the same shall become a law without his signature, unless the general assembly, by its adjournment, prevents its return, in which case it shall not become a law. Every joint resolution or

Johnson City v. Eastern Electric Co.

order (except on questions of adjournment), shall likewise be presented to the governor for his signature, and before it shall take effect shall receive his signature; and on being disapproved by him shall, in like manner, be returned with his objections; and the same, before it shall take effect, shall be repassed by a majority of all the members elected to both houses, in the manner and according to the rules prescribed in case of a bill."

It is manifest from a reading of the foregoing section that if the insistence of the appellant be the true postulate from which we should proceed, that is to say, if the return must be made to the house when a quorum of its membership is present, then the meaning of the phrase in the above section, "unless the general assembly by its adjournment prevents its return" is that any adjournment which would result in the absence of a quorum would be such an adjournment as would prevent the return of the bill, and therefore it would result that the governor could not return a bill during adjournment if the house in which it originated had adjourned for midday luncheon, or had adjourned at night until the following morning, or had adjourned for any longer period of time, or had finally adjourned.

If we should adopt the above conclusion it would necessarily result in a holding that the time during which the house in which the bill originated was temporarily adjourned could not be counted against the time limiting the governor's right or power to return

Johnson City v. Eastern Electric Co.

the bill with his objections to five days from the time it was presented to him, and therefore in order, that the governor might at all times be advised of the amount of time within which the power was still in him to so act in respect of any particular bill, it would be necessary that he be informed of the length of each adjournment, and that he add the space of each to the five days' time referred to above. We think such a construction would result in many evils and abuses, and that it is not the one intended by the framers of section 18 of article 3.

The sound insistence is the one made by appellee. "Adjournment," as used in the phrase above quoted from the constitution, means final adjournment. The framers of the constitution must have known that each house of the general assembly which would meet after the adoption of the Constitution of 1870 would have a committee on enrolled bills. Such a committee is necessary to the orderly administration of legislative business. Such a committee existed in each house of the general assembly of Tennessee prior to the adoption of the Constitution of 1870, and has existed since the adoption of that constitution. Soon after the adoption of the Constitution of 1870, in fact at the session of the general assembly of the year 1871, legislation was passed, which now appears as sections 227 to 230, inclusive, of Shannon's Code. These sections are as follows:

"Section 227. Every bill, joint resolution, or order, except on questions of adjournment, shall, after the

Johnson City v. Eastern Electric Co.

same has been passed, enrolled and signed by the speakers of both houses of the general assembly, be presented by the committee on enrolled bills of that house wherein such bill, joint resolution, or order, originated, to the governor for his signature; and said committee shall report that they have presented the bill, joint resolution, or order to the governor for his signature, and the date of such presentation, which report shall be entered on the journal of that house to which such committee belongs: Provided, that no bill, joint resolution, or order shall be presented to the governor as aforesaid until the time for moving a reconsideration shall have expired, unless expressly ordered by that house wherein such bill, joint resolution, or order originated: And provided further, that the speaker of the senate shall first sign all bills and joint resolutions originating in the senate, and the speaker of the house of representatives shall first sign all bills and joint resolutions originating in the house of representatives.

“Sec. 228. If the governor shall fail to return any bill, joint resolution, or order, with his objections, within five days (Sundays excepted) after it shall have been presented to him, it shall be the duty of the committee on enrolled bills of that house wherein such bill, joint resolution, or order originated to cause said bill, joint resolution, or order forthwith to be reenrolled; and the same shall thereupon be signed by the re-

 Johnson City v. Eastern Electric Co.

spective speakers of each house, who shall annex and sign the following certificate:

“ ‘This bill (joint resolution or order) having been presented to the governor for his signature on the _____ day of _____, and the governor having failed to return it within the time prescribed by law, the same is hereby declared to have become a law (or, in case of a joint resolution or order, the same is hereby declared to have taken effect). This _____ day of _____, 18—.

“ ‘_____,

“ ‘Speaker of the House of Representatives.

“ ‘_____,

“ ‘Speaker of the Senate.’

“Sec. 229. If the governor approve the bill, joint resolution or order, he shall write upon the same, to the left of and below the signature of the speaker of the two houses, the fact and date of his approval, as follows: ‘Approved _____, 18—,’ and shall sign the same as follows: ‘_____, governor.’

“Sec. 230. When any bill, joint resolution, or order shall have been returned duly signed by the governor, or shall have been passed over his veto, or shall otherwise become a law, the committee on enrolled bills of that house wherein such bill, joint resolution, or order originated, shall forthwith file the same in the office of the secretary of State, and shall report the fact and date of such filing, which report shall be entered upon the journal.”

Johnson City v. Eastern Electric Co.

Beyond question a return made by the governor of a bill with his objections thereto in writing to the committee on enrolled bills of the house of origin, or to any member thereof, would be a good return of the bill and objections within the meaning of the constitution. The committee, or any member of it *virtute officii*, would be under the duty of placing before the house where the bill originated, when a quorum was present therein, the bill with the objections of the governor thereto, to the end that the bill might be reconsidered by that house, and if passed by it, and passed by the other house, notwithstanding the objections of the executive, it might be dealt with by the committee as provided by section 230 of Shannon's Code. Furthermore, we think such a return might properly be made within the meaning of the constitution to the clerk of the house in which the bill originated. He would be chargeable by reason of his office or employment with the duty of informing the house, when a quorum was present, of the fact that the governor had returned the bill with his objections thereto. The house in which a bill originates is a component part of the general assembly. The general assembly is one of the three distinct departments of government, under our constitution. See article 2, section 1.

The house in which a bill originates is a parliamentary body, and must, so far as the manual possession of its journals, bills and enrolled bills, resolutions and the like, is concerned be represented by agents. It has custody of such things through its agents, and al-

Johnson City v. Eastern Electric Co.

though a house in which a bill originated might be in open session with a quorum present, it could only gain knowledge of the fact that the bill was returned by the governor, with his objections, through the manual act of some agent for the house, or member acting in that capacity. In other words, if a bill should be returned by the governor, with his objections, to the house in which it originated, while the house was in open session, with a quorum present, and ready to reconsider the bill, the messenger from the governor, or the governor himself, if he should return the bill in person, would doubtless deliver manual possession of the bill to the clerk of the house, to the speaker of the house, or to some member of the committee on enrolled bills, and by means of the individual agency so selected, the house would gain intelligence of the fact that the bill had been returned, and of the substance and meaning of the objections of the governor returned with the bill. These considerations demonstrate that it could not have been the intent of the framers of section 18 of article 3 that the return of the bill, with the objections of the governor could only be made while the house in which the bill originated was in open meeting with a quorum present. Nothing could be accomplished by a return of this character which would not be equally well accomplished in any one of the other modes above indicated. The intent of the framers of constitution was that the governor should have five days' time within which to consider the bill and to determine whether he would approve

Johnson City v. Eastern Electric Co.

and sign the bill, or refuse to sign it, and return it with his objections to the house in which it originated. If the framers of the constitution had intended that the governor should have a longer time within which to perform those duties, that intent would no doubt have been made to appear in plain terms.

Only one contingency can save a bill from becoming a law, where the governor fails to return it with his objections, to the house where it originated within the time limited; "the same shall become a law without his signature unless the general assembly, by its adjournment, prevents its return, in which case it shall not become a law." Such is the unmistakable mandate of the constitution. House Bill No. 19 was not returned during the time limited within which power was vested in the governor to return it with his objections; its return was not prevented by final adjournment of the assembly; therefore the bill became a law at the expiration of the time limited, and its subsequent return by the governor to the house, and any action on it taken by the house must be regarded as nullities. When the bill became a law it was the duty of the committee on enrolled bills to deal with it as required by the provisions of sections 228 and 230, Shannon's Code.

In support of the conclusions above reached it may be noted that section 18 of article 3 will not bear the construction that the adjournment of the house in which the bill originates, is sufficient to prevent the return of a bill with the objections of the governor.

Johnson City v. Eastern Electric Co.

To work that result both houses must adjourn; the "general assembly" must adjourn; there must be an end of the session during which the bill originated. A session of the general assembly is an entirety within the meaning of our constitution. If it be a regular session its beginning is fixed by the constitution, section 8 article 2 and the session terminates when both houses composing it shall have adjourned *sine die*. If the general assembly be convened into session by a proclamation of the governor as it may be under section 9 of article 3, its session begins at the time fixed in the call, and ends with its adjournment *sine die*. There is no warrant in the constitution for the idea that a session of the general assembly ends with each temporary adjournment by the joint action of both houses composing it, nor for the idea that a new session begins with each subsequent resumption of activity. The session is continuous, although parliamentary and legislative activity, which must be accomplished by human agencies, necessarily cannot be continuous. If the intent of the framers of the constitution had been that a mere temporary adjournment of the house in which a bill originated could prevent its return by the governor within the time limited, no reason can be imagined for their failure to express the idea in plain terms. The words "general assembly" should have been omitted if such was the intent, and the words, "the house in which the bill originated," should have been substituted in lieu.

Johnson City v. Eastern Electric Co.

In the second edition of the American and English Encyclopedia of Law, volume 26, p. 551, the substance of the text is that where there is a constitutional provision that in case of failure of an executive to act upon a bill presented to him within a specified time it shall become a law, it is usually modified by the provision that in case of an adjournment of the legislature before the expiration of the time limited the bill shall not become a law, and that such provisions in a constitution mean a final adjournment, and cases are cited in notes 11 and 12 to sustain the above text.

A learned author on statutory construction has the following text on the same subject:

“Many constitutions provide that an act shall become a law without the governor’s signature if he retain it for a certain number of days after it is presented to him for approval (citing *McNeil v. Commonwealth*, 12 Bush. [Ky.], 27), unless the adjournment of the legislature shall prevent him from returning it within that time, and in that case that it shall not become a law. The adjournment intended by this provision is a final adjournment, not adjournments from time to time.” . Lewis’ Sutherland, Statutory Construction (2d Ed.), vol. 1, sec. 62.

To sustain his text the author cites *Miller v. Hurford*, 11 Neb., 377, 9 N. W., 477, and *State v. Michel*, 52 La. Ann., 936, 27 South., 565, 49 L. R. A., 218, 78 Am. St. Rep., 364.

The doctrine announced by the text-books above cited seems to have had its origin, so far as the Amer-

Johnson City v. Eastern Electric Co.

ican courts are concerned, in the opinion of the justices reported in 3 Mass., 567. This opinion was rendered in 1791, and appears to be the leading case of the line supporting the doctrine as laid down in the above text-books. The holding was followed in the opinions of the justices on the Soldiers Voting Bill rendered in 1864 by the New Hampshire Supreme Court; see 45 N. H., 607. Next in order of date is *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep., 432, decided in 1870; next is *Corwin v. Comptroller*, 6 S. C., 390, decided in 1875; next is *Miller v. Hurford*, 11 Neb., 378, 9 N. W., 477, decided in 1881; next is *Hequembourg v. City of Dunkirk*, decided by the supreme court of New York in 1888 and reported in 49 Hun, 550, 2 N. Y. Supp., 447.

Each of the foregoing cases supports the text above quoted from the text-books, and also of course supports the view which we take in the present case of the meaning of section 18 of article 3 of our constitution. In each of the cases above referred to, the constitutional provision construed by the court was in substance the same as the provision construed by us in the present case. It is insisted for appellant, however, that there is a conflict of authority in the American courts. The conflict is very slight, if it may be said to exist. The first opposing case relied on is *People v. Hatch*, 33 Ill., 135. The text of the Illinois Constitution construed by the court in that case was substantially the same as our own with one very material exception; for after the words, "unless the general assembly shall by their adjournment prevent its

Johnson City v. Eastern Electric Co.

return," the section construed in the Illinois Constitution concluded as follows:

"In which case the said bill shall be returned at the first day of the meeting of the general assembly, after the expiration of the said ten days." Const. Ill. 1848, art. 4, sec. 21.

This last-quoted clause is not in our constitution. If it were we could very well reach the same conclusion at which the Illinois court arrived (without, however, adopting all of its reasoning), for it is manifest that the last-quoted clause unerringly indicated the intent of the Illinois Constitution to be that the return of the bill should only be made to the house in open meeting. There was a clearly implied grant to the governor of such additional time in which to make the return as might elapse between the expiration of the ten days expressly granted and the first day of the meeting of the general assembly thereafter. The intent of the Illinois Constitution clearly was that a temporary adjournment of the house should relieve the governor of the duty of making the return during such adjournment; while under our constitution no such intent can be discerned, but a contrary one, as we think, clearly appears. Some of the reasoning of the Illinois court is in conflict with the views we entertain, and with those entertained by the other courts above cited. But it is manifest that the conclusion reached by the Illinois court must be rested upon the peculiar provision of its constitution above set out. The next case relied on by appellant is *State v. South Norwalk*, 77 Conn.,

Johnson City v. Eastern Electric Co.

257, 58 Atl., 759. That case was decided in 1904 and while it construed a section of the Connecticut Constitution similar in substance to our section 18 of article 3, and held that a mere temporary adjournment of the legislature would, within the intent of the Connecticut Constitution, prevent the return of a bill by the governor with his objections to the house in which it originated; yet when examined the decision seems to be rested on a practical construction of the Constitution of Connecticut made by the legislature and chief executives of the State and acted upon by these two departments of the government from the year 1819 down to the time of the decision of the case in 1904. Thus it appears that this practical construction of the Connecticut Constitution by two departments of the State government had continued for a period of eighty-five years, as the opinion recites, "since the creation of the office of executive secretary in 1819 the invariable practice in returning a bill has been to return it by his hand for delivery in open house to the proper officer." Now the constitution construed in that case was adopted in 1818, so that the construction which was sustained by the opinion had been placed upon the constitution practically during the entire period of its existence. The opinion, though rendered long after the establishment of a unanimous current of authority contrary to some of the reasoning contained in the opinion, fails to notice any of the cases holding the opposing view. With the exception of such support as appellant's position may have in the

Johnson City v. Eastern Electric Co.

reasoning of the two cases last-above mentioned, we have been unable to find any support for it in any of the adjudicated cases which we have examined. There is, however, to be found, at section 64, volume 1, Lewis' Sutherland, Statutory Construction, a text apparently supporting appellant's view, but to sustain this text the author cites *People v. Hatch*, 33 Ill., 135, which we have discussed supra.

Appellant insists, however, that sections 227 to 230 of Shannon's Code, compiled from chapter 139 of the Acts of 1871 and already set out in this opinion, amount to a construction of section 18 of article 3 of our constitution in conflict with the view which we have expressed. Appellant insists that:

"This legislation clearly contemplates that the five days mentioned in said section 18 were legislative days and not calendar days, and that the bill when vetoed should be returned to the house in which it originated, while the same was sitting, and not while it was in recess, or when the assembly had adjourned, even though temporarily."

Now under our constitution it is provided that:

"The senate and house of representatives, when assembled, shall each . . . sit upon its own adjournments from day to day. Not less than two-thirds of all the members to which each house shall be entitled shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized, by law, to compel the attendance of absent members."

Johnson City v. Eastern Electric Co.

See section 11, article 2. Note in the foregoing quotation from the insistence of appellant the word "sitting," in describing the condition in which it insists the house shall be when the return of a bill is made.

In view of the foregoing quotation from the constitution, article 2, section 11, we take it that the word "sitting," in appellant's insistence, means when the house is in legislative session, with a quorum present, because, if any other meaning should be given to the word "sitting," it is apparent that less than a quorum of the membership of the house would have no power to reconsider a bill, if returned while less than a quorum was in the house, and an insistence that the governor might make a return to less than a quorum of the house where a bill originated is tantamount to an insistence that the governor might make a return to one member of the house. We are unable to see the force of the insistence that the legislation above referred to amounts to a practical construction of section 18, article 3, in conflict with the view which we have announced as the true construction of that section. The legislation referred to, as we think, merely outlines a course of conduct in no way in conflict with the plain terms of section 18, article 3. These sections were enacted to promote the orderly administration of the business of the legislative department of the government.

So far as we have judicial knowledge of any practical construction of section 18 of article 3 in this

Johnson City v. Eastern Electric Co.

State, in respect of the return of bills when disapproved by the governor, it has been that such return could be made to the clerk of the house in which the bill originated during a temporary adjournment of that house, or a joint temporary adjournment of both houses. As the word "adjournment" is generally used in this country it may be intended to signify either an adjournment temporary or final in character, and when used as it is in section 18 of article 3, resort must be had to the context to ascertain the true sense. As the word was used in England, at the time Sir William Blackstone wrote, it signified a continuance of the session from one day to another, and, said he:

"This is done by the authority of each house separately every day, and sometimes for a fortnight, or a month together, as at Christmas or Easter, or upon other particular occasions. But the adjournment of one house is not the adjournment of the other. It hath also been usual when his Majesty hath signified his pleasure that both or either of the houses should adjourn themselves to a certain day, to obey the King's pleasure so signified, and to adiourn accordingly. Otherwise besides the indecorum of a refusal, a prorogation would assuredly follow which would often be very inconvenient to both public and private business; for prorogation puts an end to the session, and then such bills as are only begun and not perfected must be resumed *de novo* (if at all) in a subsequent session; whereas, after an adjournment, all things continue in the same State as at the time of the ad-

Johnson City v. Eastern Electric Co.

journalment made, and may be proceeded on without any fresh commencement." Bla. Comm., vol. 1, sec. 186.

The distinction between adjournment and prorogation apparent in the above excerpt was made in the opinions of the justices in 3 Mass., 567.

In our opinion the decree of the chancellor was correct, and the same is affirmed, at appellant's cost.

Knafl v. Banking & Trust Co.

JOSEPH KNAFFL v. KNOXVILLE BANKING & TRUST
COMPANY. *In re* BACON.*(Knoxville. September Term, 1915.)***1. SUBROGATION. Payment of debt. Sufficiency.**

As a surety is not entitled to subrogation until the debt is paid in full, a surety on a bond to secure a city in the deposit of moneys in an insolvent banking institution is not entitled to subrogation, though he has paid the bond, where the bank was still largely indebted to the city, and the total amount of dividends, together with the amount of the bond, would not discharge the obligation; for in such case, if the surety were *pro*

rata subrogated to the bank's right to receive dividends, the city would be injured. (*Post*, pp. 657-659.)

Cases cited and approved: *Harlan v. Sweeny*, 69 Tenn., 686; *Gilliam v. Esselman*, 37 Tenn., 86.

Cases cited and distinguished: *Columbia Finance, etc., Co. v. Ky. Un. R. Co.*, 60 Fed., 794; *New Jersey Midland R. Co. v. Wortendyke*, 27 N. J. Eq., 658.

2. SUBROGATION. Contracts. Construction.

Though a bond to secure a city in a deposit of money in a bank declared that in case of default and payment of the claim the surety should be subrogated to all rights of the city against the bank to the amount of such payment, the surety only has the usual rights of subrogation, and his payment, together with dividends paid by the bank, not being sufficient to discharge the obligations due from the bank, he is not entitled to subrogation to the detriment of the city. (*Post*, pp. 660-662.)

Case cited and distinguished: *Ex parte Rushforth*, 10 Vesey, Jr., 409.

Knaff v. Banking & Trust Co.

FROM KNOX

Appeal from the Chancery Court of Knox County.—
WILL D. WRIGHT, Chancellor.

CHARLES T. CATES, JR., for appellant.

WRIGHT & JONES, D. C. WEBB and HUGH M. TATE, for
appellee.

MR. JUSTICE FANCHER delivered the opinion of the
Court.

The suit in which this petition is filed is a proceeding by complainants on behalf of themselves and all other creditors of the Knoxville Banking & Trust Company for the purpose of administering the affairs of said corporation as an insolvent concern. This particular intervening petition was filed by Charles H. Bacon to recover of the receiver of said Knoxville Banking & Trust Company in round numbers \$28,000, being the amount, with interest, of a bond executed by the said Charles H. Bacon and others, as sureties for the Knoxville Banking & Trust Company, as principal, to secure the city of Knoxville in the deposit of moneys in said banking institution.

Petitioner avers that judgment was rendered against him and all the other sureties on said bond, which judgment was paid by him alone; the other sure-

Knaff v. Banking & Trust Co.

ties being insolvent. This bond provided that the Knoxville Banking & Trust Company will "truly keep all sums of money deposited with it by the city of Knoxville, and shall pay over the same, and each and every part thereof, upon the written demand of the said city of Knoxville."

Petitioner avers, in effect, that he is entitled to recover of the receiver such *pro rata* as he may be entitled to on the \$28,000 paid by him, upon the ground that he will be subrogated to all the rights of the city of Knoxville to the extent of the payment made by him to the city on this obligation.

The petition does not aver that this payment was in full of all sums of money so deposited. On the contrary, it is admitted in the petition that the city had on deposit more than the amount of the bond, and has received only a thirty per cent. dividend. The amount of the city's deposit is shown by the bill or petition of the said city of Knoxville filed in the general cause which was ordered to be sent up with the transcript to be \$60,000, and in the briefs of counsel this sum is treated as the total amount of the deposit.

The receiver demurred to this intervening petition upon three grounds. The first ground of demurrer, we think, is conclusive of the case, to wit, that it was not averred that the entire indebtedness due the city of Knoxville from the Knoxville Banking & Trust Company has been paid, and, consequently the petitioner would not be entitled to subrogation or to any

Knafl v. Banking & Trust Co.

other relief against the Knoxville Banking & Trust Company or its receiver. It appears that, if the city should receive the full amount which will be finally paid in the receivership proceeding, it will not receive a sufficient amount to cover the entire indebtedness.

A surety is not entitled to subrogation until the debt is paid in full, the creditor in the meantime left in control of the debt, and all the remedies for collection. A *pro tanto* assignment or subrogation will not be allowed. The reason is that subrogation is a creature of equity and will never be allowed to the prejudice of the creditor. *Harlan v. Sweeny*, 1 Lea, 686; *Gilliam v. Esselman*, 5 Sneed, 86; 37 Cyc., 408.

“If the surety, upon making a partial payment, became entitled to subrogation *pro tanto*, and thereby became entitled to the position of an assignee of the property to the extent of such payment, it would operate to place such surety upon a footing of equality with the holders of the unpaid part of the debt, and, in case the property was insufficient to pay the remainder of the debt for which the guarantor was bound, the loss would logically fall, proportionately upon the creditor and upon the surety. Such a result would be grossly inequitable.” *Columbia Finance, etc., Co. v. Ky. Un. R. Co.*, 60 Fed., 794, 9 C. C. A., 264.

In *New Jersey Midland R. Co. v. Wortendyke*, 27 N. J. Eq., 658, the New Jersey court said:

“The right of subrogation cannot be enforced until the whole debt is paid. And until the creditor be wholly satisfied there ought and can be no interference

Knaff v. Banking & Trust Co.

with his rights or his securities which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim.”

In the present case Bacon was not liable for the debt beyond the amount of his bond, but the obligation to pay the bond was conditioned that the bank should “well and truly keep all sums of money deposited by the city and pay over the same and each and every part thereof.”

So that the bond was an obligation limited to \$25,000, but conditioned that the bank should well and truly keep all sums of money and pay over the same and each and every part thereof. The full amount of the bond has been discharged by the surety, but the condition expressed has not been complied with. The bank has not well and truly kept all sums of money deposited with it and paid over each and every part thereof. The principal liability still exists in part, though the surety has paid the penalty of the bond. This, however, did not satisfy the creditors' demands against the principal, which was to determine the liability on the bond. The amount of the liability is satisfied so far as Bacon is concerned, but the cause and determination of that liability is not satisfied in full.

The particular prejudice to the city by permitting a *pro tanto* assignment in this case to the extent of the payment by the surety lies in the fact that the *pro rata* which the city would receive from the principal debtor would become less.

Knaff v. Banking & Trust Co.

But it is said that this case does not involve the doctrine of equitable subrogation alone. The bond provided for what is termed conventional subrogation in the following words:

“In case of default hereunder and the payment of a claim under this bond, the said surety shall be forthwith subrogated to all the rights of the said city of Knoxville against the said bank, its receiver, or any person or corporation as respects such funds to the amount of such payment; and the city of Knoxville, Tennessee, covenants to execute all papers required and to cooperate with the said surety in order to secure for the said surety such rights.”

This provision must be considered in connection with the undertaking, of which it is a part, to secure the city against all loss. It does not provide for subrogation *pro tanto* upon payment of a part of the obligee's claim. The bond was not to pay a particular \$25,000, but was an obligation to pay any deficit left unpaid by the principal, to the extent of \$25,000.

Had it chosen to do so, the city might have deferred action on the bond until it had received the last dollar from the receiver, and then it could sue the surety on the bond and recover the full amount of the penalty, not exceeding the total debt unpaid. But the city did not have to exhaust the assets of the principal before a recovery from the surety. The fact that it recovered judgment and received payment from the surety before exhausting the principal does not alter the case.

Knaff v. Banking & Trust Co.

We are of opinion that this contractual subrogation is nothing more than the usual equitable right which the surety would have without stipulation. Before the court would permit a subrogation in favor of a surety that would be to the detriment of the obligee in the bond, the contract should be so certain as to admit of no doubt on that question. In the present case the main object of the bond was to secure and save harmless the city of Knoxville on all deposits it might make in the Knoxville Banking & Trust Company. We see no provision in the contract for a subrogation inconsistent with that purpose. The subrogation mentioned in the bond to be forthwith made in case of default and payment of a claim thereunder did not contemplate a subrogation which should lessen the recovery of the city, but only a subrogation in harmony with the purpose of the bond, which must have been upon such payment and under such conditions as would preserve all the rights to the city to receive its full debt. In other words, the subrogation not being stated otherwise, must be considered as in harmony with the obligation to well and truly keep all sums of money deposited by the city and pay over the same and each and every part thereof.

Counsel for petitioner cite *Ex parte Rushforth*, 10 Vesey, Jr., 409, in which a bond with surety in the penalty of £10,000 was conditioned for the payment of such sums as would be advanced to the principal. Twenty thousand pounds were advanced to the principal, who then became bankrupt. The surety paid

Knaff v. Banking & Trust Co.

the penalty and sought subrogation against the estate of the principal. In the opinion Lord Chancellor Eldon said:

“I think the bankers are not entitled in equity to say as against the surety that their demand is more than £10,000, the amount of the bond he has given, upon which he would be *prima facie* entitled to stand in their place; as to the residue of their debt they ought to be considered, if I may so express it, as their own insurers.”

We think there is fault in the reasoning of this case, and that it is not in harmony with the principles of equity governing the doctrine of subrogation. The condition of the bond was to pay such sums as would be advanced to the principal without limiting the amount which should be advanced. The fault in the reasoning is readily seen when it is considered that the obligee may first apply all that the principal obligor can pay, and then resort to the bond for any amount left unpaid not exceeding the amount of the penalty; for it is the final amount left unpaid by the principal which is intended to be secured by the surety.

It results that, in our judgment, there was no error in the decree of the chancellor, and it is affirmed.

Winslow v. Winslow.

LUCY C. WINSLOW v. HENRY M. WINSLOW.*

(Knoxville. September Term, 1915.)

1. DIVORCE. Alimony. Award in solido. Statute.

Under Shannon's Code, section 4222, providing that the court may decree to the wife such part of the husband's real and personal estate as it may think proper, where an absolute divorce was awarded a wife for abandonment against her husband, worth some \$170,000, the husband having been the more to blame in their difficulties, an award to the wife of \$200 a month alimony cannot stand, and she will be decreed \$50,000 *in solido*. (*Post*, pp. 665-670.)

Cases cited and approved: *White v. Bates*, 89 Tenn., 570; *Watson v. Campodonico*, 3 Higgins, 698.

Cases cited and distinguished: *Chenault v. Chenault*, 37 Tenn., 248; *Boggers v. Boggers*, 65 Tenn., 299.

Codes cited and construed: Secs. 4221-4223 (S.).

2. DIVORCE. Allowances. Attorneys' fee.

Attorneys for the wife in her successful suit for absolute divorce against her husband were entitled to a fee of \$5,000 from the husband though they could have procured a divorce upon the ground of abandonment alone with very little trouble, but in fact charged cruel and inhuman treatment and infidelity as well. (*Post*, pp. 670, 671.)

3. DIVORCE. Allowances. Attorneys' fee.

Attorneys' fees are treated as part of the expenses incident to a divorce case, and are generally allowed the wife, whether complainant or defendant, both upon the successful termination of her suit for divorce, as well as for services *pendente lite*. (*Post*, p. 671.)

Case cited and distinguished: *Shy v. Shy*, 54 Tenn., 125.

*As to the amount of permanent alimony on absolute divorce see note in 44 L. R. A. (N. S.), 998.

As to husband's liability for services rendered his wife in divorce suit, see notes in 24 L. R. A., 629; 13 L. R. A. (N. S.), 244; L. R. A., 1915C, 467.

Winslow v. Winslow.

FROM ROANE

Appeal from the Chancery Court of Roane County.—
HUGH G. KYLE, Chancellor.

JOUROLMON & WELCKER, for appellant.

H. M. CARR and WRIGHT & JONES, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

The complainant filed a bill for divorce against defendant, charging him with adultery, cruel and inhuman conduct, and abandonment. An answer was filed by defendant and an immense amount of proof taken. Upon the hearing the chancellor found that the first two charges were not sustained by the proof, but granted a decree for absolute divorce to the complainant on the ground of abandonment. The chancellor also decreed an allowance of \$200 per month alimony in favor of complainant, and \$5,000 attorney's fees.

The complainant has appealed, objecting to this allowance of alimony and to the form in which it has been allowed, she insisting on a lump sum, and she also objects to the amount allowed as attorney's fees.

The defendant has filed the record for a writ of error, and insists that the allowance for alimony is too much, and also insists that the allowance to attorneys for complainant is excessive.

Winslow v. Winslow.

The Winslows were married in 1884 in Kentucky, having removed to Harriman, Tennessee, about 1903. The proof in this case covers the period of their married life. Both parties have exhibited a singular lack of delicacy, and have revealed and elaborated the most intimate details of their domestic relations. We have discussed these things in an oral opinion, and they will not be referred to here. We find the greater blame to attach to the husband in the matrimonial difficulties of these parties.

The principal question to be determined in this court is the amount and form of alimony. There is no appeal from that part of the chancellor's decree granting complainant a divorce; but, inasmuch as alimony is affected by the conduct of the parties and is proportioned to some extent according to their respective merits, we have found it necessary to consider the proof in all its aspects.

A reference was ordered by the chancellor to determine the net value of the defendant's estate. The master thought this to be \$166,517.68. The chancellor thought the net value of the estate was \$178,765.28. The master and the chancellor concurred on the great majority of items, and we take it to be settled by this concurrent finding that the net value of defendant's estate is around \$170,000, and we will so value it in disposing of the question of alimony.

Our statutes on the subject of alimony are contained in Shannon's Code, sections 4221-4223, inclusive. They are as follows:

Winslow v. Winslow.

Sec. 4221. "Whether the marriage be dissolved absolutely or a perpetual or temporary separation be decreed, the court may make an order and decree, for the suitable support and maintenance of the complainant and her children, or any of them, by the husband, or out of his property, according to the nature of the case and the circumstances of the parties."

Sec. 4222. "And in such case the court may decree to the wife such part of the husband's real and personal estate as it may think proper. In doing which, the court may have reference to the property which the husband received by his wife at the time of the marriage, or afterwards, as well as to the separate property secured to her by marriage contract or otherwise."

Sec. 4223. "The court may enforce its orders and decrees by sequestering the rents and profits of the real estate of the husband, if he has any, and his personal estate and choses in action, and by appointing a receiver thereof, and from time to time causing the same to be applied to the use of the complainant and her children, or by such other lawful ways and means as are usual and according to the course and practice of the court, as to the court, shall seem meet and agreeable to equity and good conscience."

It is to be observed that under our statutes the court is expressly authorized to decree to the wife such part of the husband's real and personal estate as it may think proper.

The practice in Tennessee for many years has been to award alimony *in solido*, upon the granting of an

Winslow v. Winslow.

absolute divorce, rather than to award to the wife a monthly or yearly allowance, payable by the husband.

In *Chenault v. Chenault*, 37 Tenn. (5 Sneed), 248, the court held that in case of a divorce from bed and board it was the duty of the court to set apart to the wife an allowance in money sufficient to support her as long as the marriage relation existed, the payment of this allowance to be charged on the husband's estate during the separation. But the court further said:

“In case of a divorce *a vinculo*, which extinguishes the marriage relation, and leaves the parties as if the marriage had never taken place, a very different rule prevails. In the latter case, the duty of maintenance, on the part of the husband, is at an end, as much as if the dissolution had been effected by the death of the wife. The course generally is to make a reasonable division of the husband's estate, and to vest in the wife absolutely a specific portion thereof. Such is the rule prescribed by the act before referred to.”
Chenault v. Chenault, *supra*.

In *Boggers v. Boggers*, 65 Tenn. (6 Baxter), 299, the court said:

“The principle decided in *Chenault v. Chenault*, 5 Sneed, is certainly correct; that is, that where the divorce is only from bed and board, the married relation still subsists, and the husband is still bound to maintain his wife, and this duty the court may, from time to time, enforce; but where the divorce is from the

Winslow v. Winslow.

bonds of matrimony, the obligation of the husband to support the wife no longer subsists, and no order or decree can be made upon the husband to bind his future services or earnings. In such case the court can only give the wife a decree for part or all that the defendant then owns, according to the circumstances.”

In *White v. Bates*, 89 Tenn., 570, 15 S. W., 651, the same rule was recognized. Such has been the practice in Tennessee, and there is no occasion to depart from it in the case before us.

The relations between these two parties are unfriendly. If we undertake to have a periodical allowance, paid by the defendant to the complainant, the collection of the installments will no doubt occasion future disturbances. Moreover, the payment of an allowance to the complainant in the manner decreed by the chancellor is merely granting to her a life estate at best, and we see no reason why the very substantial alimony to which we think she is entitled in this case, absolutely, and in fee so far as the real estate is concerned, should be reduced to a life estate.

In addition to this, complainant's alimony should not be dependent upon the defendant's business fortunes. His property might be swept away. If a specific amount of this estate be decreed to her and she loses it, it is her own fault. At any rate, she desires her alimony in this form, and we think she is entitled to it under our statutes and the settled practice in Tennessee.

Winslow v. Winslow.

We do not find it worth while to review the authorities cited by learned counsel from other States as to the form in which alimony should be allowed. Each State has its peculiar statutes upon the subject, and the decisions from other States are of little service to us in construing our own acts.

In *Watson v. Campodonico*, 3 Higgins, 698, where this court affirmed the decree of the court of civil appeals, it appeared that the husband had no real estate nor any personalty except articles of trifling value. He did have an earning capacity, and, upon granting his wife a divorce, the chancellor ordered him to pay \$8 per week toward her support. In subsequent proceedings this decree was attacked as void and beyond the jurisdiction of the court, but it was upheld in *Watson v. Campodonico*, and the court of civil appeals and this court sustained the said decree as valid.

Campodonico had no property which might have been decreed to the wife, and we thought under the facts in that case it was proper for the court to have made the order "for the suitable support and maintenance of the complainant and her children by the husband," under section 4221, Shannon's Code. Mr. Justice Buchanan dissented from this conclusion.

In so far as *Boggers v. Boggers*, and *Chenault v. Chenault*, supra, held that future earnings of the husband could not, under any circumstances, be bound, upon the granting of a divorce from the bonds of matrimony, we declined to follow those cases. We thought they did not take into account the express provisions

Winslow v. Winslow.

of Shannon's Code, section 4221. So we held that where the husband had no property, but did have an earning capacity, it was proper to charge that earning capacity and his future acquisitions with his wife's support upon granting her an absolute divorce.

Such procedure, however, is attended with inconvenience and is justified largely by the necessities of the situation, and where the husband has sufficient property at the time of the divorce, it is better to follow out settled practice and decree to the wife a specific portion thereof for her maintenance.

Under the facts of this case we think that the complainant is entitled to \$50,000 alimony, and a decree will be entered in her favor against the defendant for that sum, to be secured and settled in partial payments as directed in memorandum for decree.

We think the chancellor reached the correct result as to attorney's fees, and that complainant's solicitors are entitled to a fee of \$5,000. It is urged that they could have procured a divorce upon the ground of abandonment with very little trouble, as such an effort would not have been resisted, and that complainant and her counsel unnecessarily injected other issues into the case, and that counsel should not be compensated for their efforts to prove the charges not sustained by the chancellor.

We think there was evidence before the counsel for complainant to justify them in making the other charges against the defendant. Abandonment is a ground for absolute divorce within the discretion of

Winslow v. Winslow.

the court, and it was advisable that the other matters be included by complainant to strengthen her case in her effort to obtain a divorce *a vinculo*.

In Tennessee attorney's fees are treated as—
“part of the expenses incident to the cause, and are generally allowed to the wife whether she be complainant or defendant, in a suit for divorce. They follow, and are usually adjudicated with, the allowance of alimony and costs to the wife, but are not in themselves the substantive objects of the litigation.” *Shy v. Shy*, 7 Heisk. (54 Tenn.), 125.

Under our practice the wife's attorney's fees are treated just like her alimony. She is entitled to recover both upon the successful termination of her suit for divorce, as well as an allowance for such purposes *pendente lite*. Here again we may observe that we cannot follow the decisions of other States called to our attention, inasmuch as our practice in this matter is settled.

All the costs of the cause will be paid by the defendant, and he will not be allowed any credit for sums heretofore advanced by him upon the order of the chancellor for temporary alimony, expenses, etc.

Stone v. Fidelity & Casualty Co.

J. C. STONE *v.* FIDELITY & CASUALTY CO. OF NEW YORK.

(*Knoxville*. September Term, 1915.)

1. INSURANCE. Accident Insurance. "Accidental means."

An injury is not produced by accidental means, within the terms of a policy, where it is the natural result of an act or acts in which the insured intentionally engages, and is caused by a voluntary, natural, ordinary movement, executed as was intended. (*Post*, pp. 675-678.)

Cases cited and approved: *In re Scarr*, 1 K. B., 367; *Cledera v. Scottish Accident Ins. Co.*, 19 R., 355; *Smith v. Travelers' Ins. Co.*, 219 Mass., 147; *Feder v. Iowa St. Traveling Men's Ass'n.*, 107 Iowa, 538; *Shanberg v. Fidelity & Casualty Co. (C. C.)*, 143 Fed., 651; *Lehman v. Great West. Acc. Ass'n*, 155 Iowa, 737; *Smouse v. Iowa St. Traveling Men's Ass'n*, 118 Iowa, 436; *McCarthy v. Travelers' Ins. Co.*, 8 Biss., 362; *Niskern v. United Brotherhood*, 93 App. Div., 364; *Hastings v. Travelers' Ins. Co. (C. C.)*, 190 Fed., 258; *Cobb v. Preferred Mut. Acc. Ass'n*, 96 Ga., 818; *Travelers' Ins. Co. v. Selden*, 78 Fed., 285; *Southard v. Railway Passengers, etc., Co.*, 34 Conn., 576; *Standard Life & Acc. Ins. Co. v. Schmaltz*, 66 Ark., 588; *Atlanta Acc. Ass'n v. Alexander*, 104 Ga., 709; *McGlinchey v. Fidelity & Casualty Co.*, 80 Me., 251; *Reynolds v. Equitable Acc. Ass'n*, 59 Hun., 13; *Pervangher v. Casualty, etc., Co.*, 85 Miss., 31; *Bailey v. Interstate Casualty Co.*, 8 App. Div., 127; *Rodey v. Travelers' Ins. Co.*, 3 N. M. (Gild.), 543; *Taylor v. Gen. Acc. Corp.*, 208 Pa., 439; *Stout v. Pac. Mut. L. Ins. Co.*, 130 Cal., 471; *Mutual Acc. Ass'n v. Barry*, 131 U. S., 100; *North Am. Life & A. Ins. Co. v. Burroughs*, 69 Pa., 43; *Horsefall v. Pacific Mutual L. Ins. Co.*, 32 Wash., 132; *Young v. Railway Mail Ass'n*, 126 Mo. App., 325; *Rose v. Commercial Mut. Acc. Co.*, 12 Pa. Super. Ct., 394; *Patterson v. Ocean Acc. & Guaranty Co.*, 25 App. D. C., 46.

Stone v. Fidelity & Casualty Co.

2. INSURANCE. Accident Insurance. "Accidental means."

Complainant, who attended a football game on a cool day when the ground was damp, and contracted a cold, resulting in lumbago, and who after medical treatment and the debility resulting from a purgative, and while lying in bed, had a paper brought, reached for it, and raised it suddenly above his head, when his strong blood pressure caused a rupture of the retina, destroying the sight of one eye, could not recover on a policy insuring him against bodily injury through "accidental means," since, while the result was not foreseen, the cause producing the result was not accidental, but an ordinary natural movement, executed as intended. (*Post*, pp. 678-680.)

Case cited and approved: Insurance Co. v. Bennett, 90 Tenn., 256.

FROM HAMILTON

Appeal from the Chancery Court of Hamilton County.—W. B. GARVIN, Chancellor.

SPEARS & SPEARS, for appellant.

THOMPSON, WILLIAMS & THOMPSON, CREED F. BATES and JAMES B. WRIGHT, for appellee.

MR. JUSTICE FANCHER delivered the opinion of the Court.

Complainant sued to recover under the terms of a policy which was to insure him against bodily injury sustained during the term of one year, through accidental means, and resulting directly, independently,

Stone v. Fidelity & Casualty Co.

and exclusively of all other causes, in immediate, continuous, and total disability. The injury complained of is stated as follows:

“Complainant would now show the court that some time in November, 1913, he went to Nashville, Tennessee, to attend the football game between Vanderbilt and Sewanee; that the day was rather cool, and the ground was rather damp; he attended the game on the afternoon of November 27, 1913, and at that time contracted a cold, resulting in lumbago; that he stayed in Nashville all night, and sat up until about twelve o'clock, returning home the next day, the 28th. On the morning of the 28th he awoke with a cold and lumbago, and in the evening came home and went to bed, and was confined to his room and bed for seven consecutive days. He consulted Dr. Mitchell and told Dr. Mitchell that he was going to take some medicine known as ‘black draught,’ thinking by this means to clean out his system, and thus restore his health. This medicine was composed of two-thirds of a pint of whisky and a box of ‘black draught,’ which was a very strong liver medicine. These were poured together so as to make the whole in quantity above one quart. The effect of this medicine was to purge his system. Complainant took a dose of this medicine on the morning of the third of December before supper (breakfast) and continued this treatment, taking it before each meal until the following evening. The consequence of taking this medicine was to debilitate the system, and this resulted in a very weak physical condition. This

Stone v. Fidelity & Casualty Co.

condition obtained until Thursday, when complainant was lying on the bed, and had had a short nap up to about eight o'clock. Thereupon he called his wife to bring him the Nashville Banner, and asked her to turn on the light at the head of the bed so that he might read the paper. Complainant then reached for the paper and raised it above his head, and the light was turned on, when he found he had lost the sight of his left eye. On raising his hands he felt some change had come over his left eye. On consulting a physician he was informed that the loss of his left eye was due to the fact that in his weakened condition resulting from the purging of the 'black draught,' that he raised his hand suddenly to get the paper, and that his blood pressure was strong and rushed to his head, causing a blood rupture of the retina—that is causing a little clot of blood to rest on the nerve of the eye or in the retina, thereby destroying his sight. Complainant charges that the loss of his left eye resulted wholly from accidental means."

The demurrer which the chancellor sustained raises the point that the injury or disability suffered was caused by sickness or disease, and not through accidental means, resulting directly, independently, and exclusively of all other causes.

The general rule is that an injury is not produced by accidental means, within the meaning of this policy, where the injury is the natural result of an act or acts in which the insured intentionally engages. A person may do certain acts the result of which produces un-

Stone v. Fidelity & Casualty Co.

foreseen consequences resulting in what is termed an accident; yet it does not come within the terms of this contract. The policy does not insure against an injury that may be caused by a voluntary, natural, ordinary movement, executed exactly as was intended.

Therefore, to determine the matter, we look, not to the result merely, but to the means producing the result. It is not sufficient that the injury be unusual and unexpected, but the cause itself must have been unexpected and accidental. *In re Scarr* (1905), 1 K. B., 367, 2 B. R. C., 358, 82 L. T. N. S., 128, 21 Times L. R., 173, 1 Ann. Cas., 787; *Cledera v. Scottish Accident Ins. Co.*, (1892), 19 R., 355, 29 Scott L. R., 303; *Smith v. Travelers' Ins. Co.* (1914), 219 Mass., 147, 106 N. E., 607, L. R. A., 1915B, 872; *Feder v. Iowa St. Traveling Men's Ass'n*, 107 Iowa, 538, 78 N. W., 252, 43 L. R. A., 693, 70 Am. St. Rep., 212; *Shanberg v. Fidelity & Casualty Co.* (C. C.), 143 Fed., 651, affirmed in 158 Fed., 1, 85 C. C. A., 343, 19 L. R. A. (N. S.), 1206; *Lehman v. Great West Acc. Ass'n*, 155 Iowa, 737, 133 N. W., 752, 42 L. R. A. (N. S.), 563; *Smouse v. Iowa St. Traveling Men's Ass'n*, 118 Iowa, 436, 92 N. W., 53; *McCarthy v. Travelers' Ins. Co.*, 8 Biss., 362, Fed. Cas., No. 8,682; *Niskern v. United Brotherhood*, 93 App. Div., 364, 87 N. Y. Supp., 640; *Hastings v. Travelers' Ins. Co.* (C. C.), 190 Fed., 258; *Cobb v. Preferred Mut. Acc. Ass'n*, 96 Ga., 818, 22 S. E., 976; *Travelers' Ins. Co. v. Selden*, 78 Fed., 285, 24 C. C. A., 92; *Southard v. Railway Passenger, etc., Co.*, 34 Conn., 576, Fed. Cas., No. 13,182.

Stone v. Fidelity & Casualty Co.

Attention is especially directed to the very excellent notes on the subject in 42 L. R. A. (N. S.), 563, and I Ann. Cas., 787. These notes illustrate the subject by statements of the facts.

In the foregoing cases no liability was found, because the injury was not produced by accidental means.

In *Cobb v. Preferred Mut. Acc. Ass'n*, supra, the plaintiff was in a feeble condition, and in carrying his baggage a short distance it was found that his eye was affected, finally resulting in blindness. The plaintiff had not fallen nor received any shock, blow, or jar, and there was nothing unusual in the manner of carrying the baggage or his movement while so doing. It was considered that the means producing the injury were not accidental.

In *Feder v. Iowa St. Traveling Men's Ass'n*, supra, a rupture of an artery occurred while the insured was reaching in an ordinary way over a chair to close some window shutters, and he did not fall or lose his balance. Everything was done as was intended. It was held the rupture was not sustained through accidental means.

The same doctrine is announced in other cases, but a recovery had because the injury was sustained through accidental means. These cases are *Standard Life & Acc. Ins. Co. v. Schmaltz*, 66 Ark., 588, 53 S. W., 49, 74 Am. St. Rep., 112; *Atlanta Acc. Ass'n v. Alexander*, 104 Ga., 709, 30 S. E., 939, 42 L. R. A., 188; *McGlinchey v. Fidelity & Casualty Co.*, 80 Me., 251, 14 Atl., 13, 6 Am. St. Rep., 190; *Reynolds v. Equitable*

Stone v. Fidelity & Casualty Co.

Acc. Ass'n, 59 Hun, 13, 1 N. Y. Supp., 738; *Pervangher v. Casualty, etc., Co.*, 85 Miss., 31, 37 South., 461; *Bailey v. Interstate Casualty Co.*, 8 App. Div., 127, 40 N. Y. Supp., 513; *Rodney v. Travelers' Ins. Co.*, 3 N. M. (Gild.), 543, 9 Pac., 348; *Taylor v. Gen. Acc. Corp.*, 208 Pa., 439, 57 Atl., 830; *Stout v. Pac. Mut. L. Ins. Co.*, 130 Cal., 471, 62 Pac., 732; *Mutual Acc. Ass'n v. Barry*, 131 U. S., 100, 9 Sup. Ct., 755, 33 L. Ed., 60.

The following authorities are in conflict with those above cited: *North American L. & A. Ins. Co. v. Burroughs*, 69 Pa., 43, 8 Am. Rep., 212; *Horsefall v. Pacific Mut. L. Ins. Co.*, 32 Wash., 132, 72 Pac., 1028, 63 L. R. A., 425, 98 Am. St. Rep., 846; *Young v. Railway Mail Ass'n*, 126 Mo. App., 325, 103 S. W., 557; *Rose v. Commercial Mut. Acc. Co.*, 12 Pa. Super. Ct., 394; *Patterson v. Ocean Acc. & Guaranty Co.*, 25 App. D. C., 46.

Now, looking to the particular facts here alleged, we find the cause alleged to have produced the injury was a natural and ordinary movement. Complainant was lying quietly on the bed, and called to his wife to bring him the Nashville Banner that he might read it. He then reached for the paper and raised it above his head, and the light was turned on, when he found he had lost the sight of his left eye. He was informed by his physician that the loss of the eye was due to the fact that in his weakened condition, resulting from the purgative he had taken, he raised his hand suddenly to get the paper, and that his blood pressure was

strong and rushed to his head, causing a blood rupture of the retina, thereby destroying his sight. The weakened condition, due to the purgative was not accidental, nor was the excessive blood pressure; both being physical conditions produced from natural causes. The movement of the hand suddenly to get the paper was executed exactly as intended. It was a simple and ordinary movement. The rushing of the blood with excessive pressure, rupturing the retina, was therefore caused by natural means. While the result was not foreseen, the causes producing that result were not accidental. It is well in line with the cases above cited sustaining the majority rule, which we adopt. This rule affords a reasonable interpretation of the contract.

The position here taken is not in conflict, as we view it, with the opinion of our court in *Insurance Co. v. Bennett*, 6 Pick. (90 Tenn.), 256, 16 S. W., 723, 25 Am. St. Rep., 685, when the facts of that case are properly considered.

We deem it unnecessary to pass upon the next point, raised by demurrer, namely, that if the injury may be said to have resulted through accidental means, yet it did not so result "directly, independently, and exclusively of all other causes." The learned chancellor sustained the demurrer in this respect also, and there is strong authority for his position. But, inasmuch as the foregoing is decisive of the case, and the question of proximate cause and what

Stone v. Fidelity & Casualty Co. ·

contributing facts would be too remote to be considered as entering into the accidental means producing the injury must depend upon the facts of each case, discussion on that point is omitted.

Affirmed.

Morton v. Imperial Realty Co.

PH. MORTON v. IMPERIAL REALTY Co. *et al.**

(Knoxville. September Term, 1915.)

1. LICENSES. Nonpayment of occupation tax. Action on contract.

One pursuing an occupation defined as a privilege by statute cannot recover on a contract made in pursuance of the business, if he has not paid his privilege tax. (*Post*, pp. 682, 683.)

Cases cited and approved: *Stevenson v. Ewing*, 87 Tenn., 46; *Haworth v. Montgomery*, 91 Tenn., 16; *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn., 593.

2. LICENSES. Nonpayment of occupation tax. Pleading.

Where, in suit on a contract made in pursuance of a business defined as a privilege by statute, the defendant pleads that the plaintiff has not paid his privilege tax, the burden to prove the fact so pleaded is on defendant, as the defense is essentially affirmative, and the plea evidence of extrinsic matter. (*Post*, p. 683.)

3. LICENSES. Nonpayment of occupation tax. Evidence.

One suing on a contract made in pursuance of a business defined by statute as a privilege cannot be defeated by failure to pay his privilege tax, in the absence of some proof in the record showing his default. (*Post*, p. 683.)

Cases cited and approved: *Margolys v. Goldstein*, 96 N. Y. Supp., 185; *Salmon Co. v. Box Co.*, 158 Cal., 567; *Woodley v. Zeman*, 178 Ill. App., 369.

FROM KNOX

Appeal from the Chancery Court of Knox County.—
J. PIKE POWERS, JR., Special Chancellor.

BOWEN & ANDERSON, for appellant.

*The effect of failure to procure license for business on validity of contract therein, is discussed in notes in 16 L. R. A., 423, 1 L. R. A. (N. S.), 1159 and 12 L. R. A. (N. S.), 613.

Morton v. Imperial Realty Co.

GREEN, WEBB & TATE and HENRY HUDSON, for appellees.

MR. JUSTICE GREEN delivered the opinion of the Court.

In this case a bill was filed to recover for the erection and maintenance of certain signboards upon which the complainant advertised the business of defendant.

Complainant's business is declared to be a privilege and a tax imposed thereupon by the revenue statutes of Tennessee. The complainant did not show that he had complied with these statutes, nor did it appear that he had paid his tax or taken out the license required.

These matters were interposed by the defendants in an amendment to their answer and relied on as a bar to complainant's suit.

The court of civil appeals was of opinion that complainant was charged with the affirmative duty of showing compliance with the revenue law and payment of said tax before his suit could be maintained.

It is well settled that one pursuing an occupation, defined as a privilege by our statutes, cannot recover on a contract made in pursuance of that business, if it be shown he has not paid his privilege tax. *Stevenson v. Ewing*, 87 Tenn., 46, 9 S. W., 230; *Haworth v. Montgomery*, 91 Tenn., 16, 18 S. W., 399; *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn., 593, 22 S. W., 743.

It has been held that such a plaintiff will be repelled by the court when it appears from the proof that he has not complied with the provisions of the revenue

Morton v. Imperial Realty Co.

law, although his failure to comply has not been pleaded as a matter of defense. *Cary-Lombard Lumber Co. v. Thomas*, supra.

In the case referred to and in our other cases of this character there has been proof before the court of the failure of the plaintiff to pay the privilege tax. In this case there is no proof whatever on the subject. We cannot tell from this record whether the plaintiff has paid his privilege tax or not.

We think such a defense is essentially affirmative. Certainly when a plea of this character is introduced by a defendant, setting up a failure of plaintiff to comply with the revenue laws, such a plea introduces an extrinsic matter, and the burden of showing the facts so pleaded rests upon the defendant.

Whether proof of a failure of complainant to comply with the revenue laws would be admitted over objection, without some pleading to justify it, we need not determine. There must, however, be some proof in the record showing the default of a plaintiff in this respect before he can be repelled. Such is the general rule. 25 Cyc., 634; *Margolys v. Goldstein*, 96 N. Y. Supp., 185; *Salmon Co. v. Box Co.*, 158 Cal., 567, 112 Pac., 454; *Woodley v. Zeman*, 178 Ill. App., 369.

We are of opinion, therefore, that the court of civil appeals was in error in placing the burden of showing compliance with the revenue laws upon the complainant, and its decree in this respect is reversed. Other matters in the case have been dealt with in a memorandum opinion.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION

JACKSON, APRIL TERM, 1915.

In re FORKED DEER DRAINAGE DISTRICT.

(Jackson. April Term, 1915.)

1. DRAINS. Drainage districts. County courts.

Laws 1909, chapter 185, as amended by Laws 1915, chapter 61, provides that, where lands included in a drainage district shall lie in several counties, the county court of any one of the counties has jurisdiction to create and establish such district without the necessity of resorting to the county courts of other counties for concurrent or ancillary action. Constitution article 2, section 29, declares that the General Assembly shall have power to authorize the several counties and incorporated towns to impose taxes for county and corporation purposes. *Held*, that the constitutional provision applies only to taxes, and not to special assessments; hence the legislature could validly give the county court jurisdiction over proceedings to establish a drainage district lying in several counties, since in the absence of restriction, the legislature's power is plenary, and drainage districts, being governmental agencies, need not coincide with county lines. (*Post*, pp. 687, 688.)

In re Drainage District.

Acts cited and construed: Acts 1909, ch. 185; Acts 1915, ch. 61.

Cases cited and approved: State ex rel. v. Powers, 124 Tenn., 553; Arnold v. Knoxville, 115 Tenn., 195; Smith v. Carter, 131 Tenn., 1.

Constitution cited and construed: Sec. 29, art. 2.

2. DRAINS. Power to establish.

In the absence of restriction, the legislature has plenary power over the establishment of drainage districts. (*Post*, pp. 688, 689.)

Cases cited and approved: People v. Sacramento Drainage Dist., 155 Cal., 373; State ex rel. v. Cummings, 130 Tenn., 566.

3. DRAINS. Drainage district. Nature of.

A drainage district is a governmental agency to which power to levy special assessments may be properly delegated. (*Post*, pp. 689-690.)

Cases cited and approved: Bryant v. Robbins, 70 Wis., 258; Martin v. Tyler, 4 N. D., 278; Christ v. State ex rel. Whitmore, 97 Ind., 389; Hudson v. Bunch, 116 Ind., 63.

Cases cited and distinguished: Hagar v. Reclamation District, 111 U. S., 701; Reclamation District v. Hagar, 66 Cal., 54; Shaw, v. State, 97 Ind., 23.

FROM GIBSON

Appeal from the Circuit Court of Gibson County.—
THOMAS E. HARWOOD, Judge.

DEASON, ELDER & HOLMES, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

A petition was filed in the county court of Gibson county, seeking to have created a drainage district

In re Drainage District.

for the improvement of lands along the middle fork of the Forked Deer river in the counties of Madison, Gibson, and Crockett, the procedure being that set forth in Act 1909, chapter 185, as amended by Act 1915, chapter 61.

The county court held that it was without jurisdiction and power in the premises, and declined to act. On appeal to the circuit court this ruling was upheld.

The amendatory act of 1915 undertook to prescribe an additional method of procedure, and to give the county court of any one of the counties, in which such district might in part be located, jurisdiction to create and establish such a district without the necessity of resorting to the county courts of the other counties for concurrent or ancillary action.

The adverse judgments of the lower courts were based on the idea that, because some of the tracts of land sought to be included in the proposed district lay wholly in Crockett or Madison county, and were owned by residents of these counties, it was not constitutionally competent for the legislature to impose on the court of a single county the duty of creating and establishing the proposed district.

The amendatory act undertakes to vest in such court full power to appoint a civil engineer, viewers to assess damages, commissioners to make assessments and apportion the same on the lands affected, all as fully as if the district lay entirely within one county, and also to provide that such court may make

In re Drainage District.

the final assessments on the lands in all of the counties, the assessment sums to be collected by the county trustees of the several counties so far as there were affected lands lying in their respective counties, and, when collected, to pay out the same on warrants to be drawn by the judge or chairman of such court. The assessments are made liens upon the lands.

Is it within the power of the legislature, under the constitution, to vest in a single county court the powers thus attempted to be granted?

The original act of 1909, chapter 185, was under review in *State ex rel. v. Powers*, 124 Tenn., 553, 137 S. W., 1110, and there upheld as constitutional.

One ground of attack on the original act in that case was that it was violative of article 2, section 29, of the constitution, which provides:

“The general assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for county and corporation purposes respectively, in such manner as may be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation.”

The court held that the act made provision for the levying of special assessments, and not of “taxes” within the meaning of that word in this constitutional provision, following *Arnold v. Knoxville*, 115 Tenn., 195, 90 S. W., 469, 3 L. R. A. (N. S.), 837, 5 Ann. Cas., 881, in distinguishing special improvement assessments from taxes.

In re Drainage District.

In respect of taxes, proper, we have a line of cases holding distinctly that the power to levy taxes can be delegated by the legislature only to counties and incorporated towns. *Smith v. Carter*, 131 Tenn., 1, 173 S. W., 430, and cases therein cited.

The case of *Smith v. Carter* involved an effort to invest a power to tax in a board of commissioners of a road improvement district who were not agencies of a county; the proposed district being composed of fractional parts of two counties. In the instant case we do not have to deal with a delegation of the taxing power proper; if so, the doctrine of *Smith v. Carter* would compel an affirmance of the judgment below. In such case the constitutional provision is specific, clearly applicable and inhibitory.

But we conceive that the case is different where the power involved is that of levying and collecting special assessments. We know of no constitutional provision which qualifies or interdicts the power of the legislature in that regard. If there is not, the power is plenary.

Such drainage districts are governmental agencies, and the powers respecting such are properly to be delegated to counties or to any other body the legislature may see fit.

It would be entirely competent for the legislature directly to delimit a body of lands and appoint commissioners to perform all the requisite functions that are usually delegated, and performed by assessors and commissioners chosen by the people of the district or

In re Drainage District.

some local authority. *People v. Sacramento Drainage District*, 155 Cal., 373, 103 Pac., 207; *State ex rel. v. Cummings*, 130 Tenn., 566, 172 S. W., 290, L. R. A., 1915D, 274.

“In fact, historically, such was the original method adopted when, in the reign of Henry VIII, the first statute was passed providing for the construction of sewers, drains, and other improvements designed to reclaim swamp lands (St. 23 Hen., VIII, chapter 5, par. 1 [1531]), and such is the method still adopted in many of the States of this nation. It is in accord with the progressive spirit of our government to give to the people, or any part of them, the largest possible control in matters peculiarly affecting them and their interests. It is a concession to this spirit, and not the compulsion of the law, which prompts the legislature to give the landowners so large a voice in the management of these affairs.” *People v. Sacramento Drainage District*, supra.

The power to construct drainage canals when delegated because of such considerations, need not be devolved on a county or a municipality; it may be conferred, along with the power to specially assess therefor, upon any person or body upon which the legislature may see fit to grant it. *Bryant v. Robbins*, 70 Wis., 258, 35 N. W., 545; *Martin v. Tyler*, 4 N. D., 278, 60 N. W., 392, 25 L. R. A., 838; 9 R. C. L., 620, 642.

“The fact that the lands may be situated in more than one county cannot affect the power of the State

In re Drainage District.

to delegate authority for the establishment of a reclamation district to the supervisors of the county containing the greater part of the lands. Such authority may be lodged in any board or tribunal which the legislature may designate." *Hagar v. Reclamation District*, 111 U. S., 701, 4 Sup. Ct., 663, 28 L. Ed., 569; *Reclamation District v. Hagar*, 66 Cal., 54, 4 Pac., 945; *Shaw v. State*, 97 Ind., 23.

The fact that lands affected and assessed for the construction of a ditch lie in two or more counties does not affect the authority and duties of the commissioners appointed by the court of the county where the proceedings were instituted to construct the ditch in its entirety, and assess all lands affected, whether in that or adjoining counties, in accordance with a drainage law under which the ditch is established. *Crist v. State ex rel. Whitmore*, 97 Ind., 389; *Hudson v. Bunch*, 116 Ind., 63, 18 N. E., 390.

The county court is to be considered, therefore, as the delegate of the State. On it is imposed a special authority, conferred for a special purpose, beyond those exercised by it ordinarily and within the limits of the county for which it sits. This special authority comes from the State, the power of which, touching the subject-matter, is not limited, or embarrassed in execution, by county lines.

Finding error in the judgment of the circuit court, it is reversed, with a remand for further proceedings in accord with what is herein ruled.

WESTERN UNION TELEGRAPH CO. v. NASHVILLE, C. &
ST. L. RY. CO. *et al.*

(*Jackson*. April Term, 1915.)

1. **TELEGRAPHS AND TELEPHONES.** Extension of line.
Right to make.

A telegraph company was organized under New York act of April 12, 1848 (Laws 1848, ch. 265), providing that any number of persons may associate for the purpose of constructing a line of telegraph through the State from and to any point without the State. New York act of April 8, 1851 (Laws 1851, ch. 98), required the written consent of persons owning two-thirds of the capital stock of such companies as a condition to an extension of the lines, while New York act of June 29, 1853 (Laws 1853, ch. 471), provided for an extension of the lines upon the terms and conditions prescribed in the act of 1848. *Held*, that after the passage of the act of 1853, written consent of persons holding two-thirds of the stock of such company was not necessary to an extension of its line without the State. (*Post*, pp. 700-704.)

2. **EMINENT DOMAIN.** Telegraph and railway companies.
Right to condemn.

As Act Cong. July 24, 1866, chapter 230, section 1, 14 Stat. 221 (Rev. St. U. S. sec. 5263 [U. S. Comp. St. sec. 10072]), does not confer upon telegraph companies the right to condemn an easement over a railroad right of way, but merely denies the State power to prevent an occupation and use of such right of way for telegraph purposes, a telegraph company may, under the State laws, condemn for telegraph purposes a way over a railroad right of way. (*Post*, pp. 704, 705.)

Cases cited and approved: *Western Union Tel. Co. v. Richmond*, 224 U. S., 160; *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U. S., 540; *Louisville & N. R. Co. v. Western Union Tel. Co.*, 207 Fed., 1; *Western Atlantic R. Co. v. Western Union Tel. Co.*, 138 Ga., 420.

Western Union Tel. Co. v. Railroad.

3. EMINENT DOMAIN. Telegraph and railway. Ways. Condemnation.

A petition by a telegraph company for condemnation of a way for a line of telegraph along a railroad right of way, brought under Acts 1885, chapter 66, section 1, authorizing such condemnation, providing that the ordinary use of such railroad shall not be thereby obstructed, is not bad because the petition declared that the telegraph line would not obstruct the use of the right of way for railroad purposes, and offered to move the line in case the right of way should be obstructed. (*Post*, pp. 705-709.)

Acts cited and construed: Acts 1885, ch. 66, sec. 1; Acts 1885, ch. 135.

Cases cited and approved: Railroad Co. v. Telegraph Co., 101 Tenn., 62; C. & A. R. R. Co. v. Joliet, Lockport & Aurora Railway Co., 105 Ill., 388; Peoria & Pekin Union Ry. Co., 105 Ill., 110; Railroad v. S. W. Tel. Co., 121 Fed., 276; Railroad v. Postal Tel. Co., 173 Ill., 535; Railroad v. Post. Tel. Co., 76 Miss., 731.

Cases cited and distinguished: St. Louis, etc., R. Co. v. Postal Tel. Co., 173 Ill., 508; American Telephone Co. v. St. Louis, etc., R. Co., 202 Mo., 656.

4. EMINENT DOMAIN. Compensation. Right to.

As a telegraph company, upon condemning the right to erect a telegraph line on a railroad right of way is obligated to prevent its line from obstructing the use of the right of way for railroad purposes, Shannon's Code, secs. 1844-1859, providing for compensation in money, makes adequate provision for assessment of damages and allowance of compensation. (*Post*, pp. 709, 710.)

Code cited and construed: Secs. 1844-1859 (S.).

5. EMINENT DOMAIN. Proceedings. Selection of line.

Where a telegraph company condemns the right to build a line on a railroad right of way, the telegraph company, and not the railroad company, is entitled to select the site for the telegraph line, so long as it does not interfere with the operation of the railroad. (*Post*, pp. 710-716.)

Western Union Tel. Co. v. Railroad.

Cases cited and approved: Railroad v. Railroad, 116 Tenn., 500; Western & Atlantic Ry. Co. v. Western Union Tel. Co., 138 Ga., 420; Postal Tel. Co. v. Oregon, etc., R. Co. (C. C.), 104 Fed., 623; Union Pac. R. Co. v. Colorado Postal, etc., Co., 30 Colo., 133.

Cases cited and distinguished: American Telephone, etc., Co. v. St. Louis, etc., R. Co., 202 Mo., 656; Western Union Tel. Co. v. L. & N. R. Co. (D. C.), 201 Fed., 946; Louisville & N. R. Co. v. Western Union Tel. Co., 207 Fed., 1.

6. EMINENT DOMAIN. Proceedings. Compensation.

As a telegraph company may acquire the right to construct its line on a railroad right of way where it does not obstruct the operation of the railroad, but there may be an interference not amounting to an obstruction, the railroad company cannot be denied substantial damages, particularly where the taking will force it, in case it builds its own telegraph line, to adopt a less advantageous route, this being so though the telegraph company offered to remove its line in case it should be an obstruction, for a slight interference would not amount to an obstruction. (*Post*, pp. 716-719.)

Cases cited and approved: Railroad v. Tel. Co., 101 Tenn., 62; Cleveland, etc., R. Co. v. Ohio Postal Tel. Co., 68 Ohio St., 306; Atlantic, etc., R. Co. v. Postal Tel. Co., 120 Ga., 268; Mobile, etc., R. Co. v. Postal Tel. Co., 120 Ala., 21; W. U. T. Co. v. South, etc., R. Co., 184 Ala., 66; Mobile, etc., R. Co. v. Postal Tel. Co., 76 Miss., 731; Postal Tel. Co. v. Oregon, etc., R. Co. (C. C.), 114 Fed., 787.

FROM CARROLL.

Appeal from the Circuit Court of Carroll County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
THOS. E. HARWOOD, Judge.

Western Union Tel. Co. v. Railroad.

SHIELDS & CATES and COOPER & CLARK, for plaintiff.

CLAUDE WALLER, JOHN BELL KEEBLE, ED. T. SEAY,
W. B. LAMB and PEELER & PEELER, for defendants.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

In February, 1912, the Western Union Telegraph Company, a body corporate under the laws of the State of New York, filed in the circuit court its petition for the condemnation of an easement or right of way over and along the railway rights of way owned, or occupied as lessee, by the Nashville, Chattanooga & St. Louis Railway in Carroll county, through which county run two divisions (the Nashville and the Paducah) of the lines of railway of that company. The Louisville & Nashville Railroad Company, as the owner and lessor of the Paducah division, was joined as a defendant, as were also certain others who had interests as trustees under trust deeds or mortgages executed by the two railway companies. For convenience all of the defendants will be referred to as "the railway" or "the railway company."

The Nashville division extends from Nashville Tennessee, to Hickman, Kentucky, embracing 24.95 miles in Carroll county. On that division the telegraph company at the time of the filing of its petition maintained, and for nearly fifty years prior thereto it had maintained, a telegraph line along the south side, which would be the left side (going towards Hickman) of the single track main line of railroad.

Western Union Tel. Co. v. Railroad.

The Paducah division of the railway extends from Paducah, Kentucky, to Memphis, Tennessee, and embraces 26.4 miles in Carroll county. The telegraph company, prior to the institution of the suit, had operated a line of telegraph on the east side of the single main line track of railroad—the left side, going towards Memphis.

The tracks of the two divisions cross at Hollow Rock Junction in Carroll county.

The primary purpose of the petition of the telegraph company was to condemn an easement for its pole lines along or on the routes then occupied by the petitioner on the rights of way of the railway. By stipulation in the record it appears that the widths of the rights of way on the Nashville division vary from sixty feet (the railway track being approximately in the center) to one hundred feet, though it further appears from the proof probable that at places the width is about two hundred feet. The rights of way along the Paducah division are one hundred feet in total width, the track of the railway being in the center.

The existing line of the telegraph company varies in its distance from the railway's track, on the Nashville division, due to the topography of the right of way (as it exists after the construction of the track through cuts and on fills), but its average distance would seem to be about twenty-five feet south of the center of the track. On the opposite or north side of the track, on that division, a telephone line has been constructed on the right of way of the railway, near

Western Union Tel. Co. v. Railroad.

the margin of that portion of the same that is fenced, by a commercial telephone company. There is no telephone line on the right of way of the railway's Paducah division.

Although it seems that the telegraph company's line was constructed along the Nashville division right of way prior to that date, it appears that its legal *status* was defined by a contract entered into on April 1, 1867, which provided for the furnishing of a telegraphic service to the railway's predecessor in title. This contract was ratified and extended on August 1, 1878, and again on May 14, 1880.

On June 18, 1884, another contract was entered into by the telegraph company and the railway, defining the rights of the parties as respects both the Nashville and the Paducah divisions, the latter division not having come into existence until after the date of the contract of May 14, 1880. In the contract of 1884, it was provided that one wire was to be set apart by the telegraph company for the preferential use of the railway, and that if the railway should at any time require greater wire facilities, the telegraph company should furnish an additional wire at the cost price thereof upon its poles, or, in the alternative, that the railway might, at its own cost, string such additional wire upon the telegraph company's poles in such position as the telegraph company might direct. Incorporated in this contract was the following clause which, it seems, has led to a breach and bitter litiga-

Western Union Tel. Co. v. Railroad.

tion in this and other States between the contracting parties:

“Upon the wires thus set apart for the preferential use of the railroad company, its business messages, the family and social messages of its officers and agents may be sent free between all points on its roads,” etc.

On June 27, 1911, the telegraph company wrote the railway, complaining of the extravagant use by the officers and agents of the railway of the above contract privilege, it being insisted that the service thus exacted on the defendants' systems during the year 1910 reached the value of \$521,925. It was requested by the telegraph company that this be remedied by way of a modification of the contract. Failing to reach an agreement, the telegraph company, on August 17, 1912, gave notice that the contract would be terminated. Thereafter negotiations for the purchase by the telegraph company of an easement for its pole lines were commenced, but they proved unavailing. This litigation followed.

The petition for condemnation sets forth, among other things, that the petitioner proposes to so set its poles as not to interfere with any ditch, drain, culvert, or any work or structure of the railway or the ordinary travel upon or use of the railroad—

“and, in event it may be deemed by the railway necessary to change the location of its tracks, or to construct new tracks, or side tracks, or to construct new depots, or other buildings, or to change the location of

Western Union Tel. Co. v. Railroad.

those now, or hereafter to be constructed by the defendant company, where any of the petitioner's poles and wires are located upon the said right of way, petitioner hereby agrees to remove its said poles and wires from said places or points so to be used to any part of defendant's right of way thereunto adjoining which may be designated by defendant company, upon due and reasonable notice in writing given to the petitioner by said defendant, setting forth the desired change; all of said changes, and relocation of its wires, to be made at the expense of the petitioner."

The petition also embodied the consent of petitioner that the railway might take all earth materials and water needed by the latter, and its agreement to so reset, at its own expense, its poles as to conform to any consequent changes in the grade; to hold the railway harmless from any damages to petitioner's property; to hold down interference with the operation of cars or trains on any railway tracks, etc.

The circuit court adjudged that petitioner had a right to condemn, but denied it the location at the time held by its pole line along the Nashville division. That court assigned the telegraph company a different location, but on the same side of the track of that division, alongside the present line of the telegraph thus recognizing that there was adequate space on the right of way of that division for an additional or third pole line. The location for the telegraph pole line at the place at the time occupied by the same on the Paducah division was also denied, and the location was shifted

Western Union Tel. Co. v. Railroad.

to the opposite side of the track. Substantial damages were denied and nominal damages awarded the railway.

On appeal the court of civil appeals modified the judgment of the circuit court in such way as to designate for the petitioner the locations by it sought on the two divisions, but affirmed the circuit court in other respects. That court incorporated the above recited petition stipulations, or agreements, on the part of the telegraph company, in its judgment as conditions binding on that company.

The railway has petitioned for and been granted by this court the writ of *certiorari* in order to a review of the judgment of the court of civil appeals; and, owing to the magnitude of the interests involved, in this and other States, the cause was set down for oral argument, and argued at the bar of this court. While the pending case directly affects the rights of the parties in but one county, the principles to be herein declared will govern in other suits brought, or to be brought, in other counties of this State to test the telegraph company's right to condemn easements over the rights of way of two of our largest railway systems.

The first question for solution, as one lying at the threshold of the lawsuit and determinative of all contentions, if the railway be correct in its position respecting it, is the power of the telegraph company under the terms of its charter, granted by the State

Western Union Tel. Co. v. Railroad.

of New York, to own or operate telegraph lines in this State.

The railway undertakes the maintenance of the proposition that the telegraph company cannot condemn property in this State since it is not authorized by its charter to exercise any corporate function of ownership, except under a certain provision of its charter (which it is claimed has not been complied with), requiring, by way of condition precedent to any extension of its telegraph lines, the obtaining by the telegraph company of "the written consent of the persons owning two-thirds of the capital stock of such company."

The determination of this question depends upon the proper construction of certain acts of the general assembly of the State of New York.

The telegraph company was organized, under the name of New York and Mississippi Valley Printing Telegraph Company, on April 1, 1851, under the New York act of April 12, 1848, the first section of which provided:

"Sec. 1. Any number of persons may associate for the purpose of constructing a line of wires of telegraph through this State, and from and to any point within this State, upon such terms and conditions, and subject to the liabilities prescribed in this act." Laws 1848, chapter 265.

The certificate of incorporation set out, in pursuance of section 2 of the act, the general route of the line of telegraph to be:

Western Union Tel. Co. v. Railroad.

“Through this State from the city of Buffalo to the State of Pennsylvania, along the south side of Lake Erie.”

Both the railway and the telegraph company construe the above act of incorporation to provide only for the ownership of lines within the State of New York, and we think correctly so.

On April 8, 1851, the legislature of New York passed an act amending the act of 1848, so as to provide that the directors of telegraph companies incorporated thereunder—

“may, at any time, with the written consent of the persons owning two-thirds of the capital stock of such company, extend their line of telegraph, or may construct branch lines to connect with their main line, or may unite with any other incorporated telegraph company.” Laws 1851, chapter 98.

This amendment, as will be noted, followed the incorporation of the telegraph company by one week, and its purpose evidently was to enable it to extend the originally designed line within the State of New York, touching which power the act of 1848 was silent.

The next act amending the act of 1848 was that of June 29, 1853, which, among other things, provided for the incorporation of any number of persons for the purpose of owning and maintaining lines of telegraph—

“whether wholly within, or partly beyond, the limits of this State . . . upon such terms and conditions, and subject to the liabilities prescribed in the act

Western Union Tel. Co. v. Railroad.

passed April 12, 1848. . . . And such association shall, upon complying with the provisions of the said act, . . . have the powers, and be subject to the provisions in the said act, and in the several acts amending the same, contained, not inconsistent herewith." Laws 1853, chapter 471.

By this act there were affected only companies owning lines wholly within or partly within and partly beyond the limits of New York. Ownership and maintenance of lines wholly beyond the State of New York yet remained to be dealt with. The development of the idea of a great system of telegraphic communication seems to have come, as was natural, by gradual stages, and the "lines" were conceived of as separate units. The telegraph company accepted and complied with the provisions of the act of 1853, and organized thereunder, with route set forth as being from Buffalo, N. Y., to Louisville, Ky., with a branch circuit to Lexington, Ky.

The line of the telegraph company in this State along the right of way of the railway appear to have been constructed after the passage of New York act of 1862, which provided in substance, that any telegraph company incorporated in that State might own and maintain any line or lines not described in the original certificate of organization, "whether wholly within or wholly or partly beyond the limits of this State (New York)." Laws 1862, chapter 425. Thus for the first time were there recognized and dealt with lines that might be wholly without the State of New

Western Union Tel. Co. v. Railroad.

York; and by the act it was further stipulated that such acquisition should be "upon the terms and conditions prescribed in the act of 1848," and not, as in the preceding act of 1853, upon the conditions prescribed in the Act of 1848 and in the several acts amending the same.

We are therefore of opinion that, even if the provision as to the procurement of the written consent of two-thirds of the stockholders embodied in the act of 1851 were one concededly to be treated in any event as a condition precedent, it does not apply to the line now sought to be acquired in Tennessee, and that the act of 1862, as the applicable act, does not so require. This is true, whether the line be deemed a separate one or an extension of a route designated in the charter of the telegraph company. Several considerations lead us to this result: (a) We think it manifest that, as the development of communication by telegraph became rapid and so comprehensive as to give promise of a nation-wide expansion, the legislature of the State of New York did not see fit to further impose such a cumbersome condition on the growth of the enterprise beyond the borders of that State; (b) able and diligent counsel of the railway do not point out that any question as to the lack of such a power under the above legislative acts has been raised in the courts of New York; and (c) in no reported case outside of that State does it appear that any defendant railway company has ever so much as submitted the question for adjudication, and a number of warmly contested suits

Western Union Tel. Co. v. Railroad.

between railway companies and this telegraph company, in respect of the latter's power to condemn, have been before the courts in recent years. A power thus exercised, unchallenged in that particular for fifty years, is not readily to be held ill based or nonexistent.

The next assignment of error for consideration in logical order is that, since both the railway and the telegraph company are subject to the act of Congress regulating post roads, there is no power on the part of the State to authorize the condemnation sought in this case, for that it would be an invasion of the exclusive control by the federal government over the subject-matter.

It is admitted, as it must be, that the act of Congress of 1866 (R. S. sec. 5263) does not confer upon the telegraph company the right to condemn an easement over a railway right of way. The purpose of that act was to deny to the States the power to prevent an occupation and use of such a right of way for telegraph purposes, and the power to condemn remains within State jurisdiction. *Western Union Telegraph Co. v. Richmond*, 224 U. S., 160, 32 Sup. Ct., 449, 56 L. Ed., 710; *Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U. S., 540, 25 Sup. Ct., 133, 49 L. Ed., 312, 1 Ann. Cas., 517; *Louisville & N. R. Co. v. Western Union Telegraph Co.*, 207 Fed., 1, 124 C. C. A., 573; *Western Atlantic R. Co. v. Western Union Telegraph Co.*, 138 Ga., 420, 75 S. E., 471, 42 L. R. A. (N. S.), 225, and note.

Western Union Tel. Co. v. Railroad.

No jurisdiction, therefore, is attempted to be asserted by the Congress, if it were competent for it to do so, over the particular matter of the power or mode of acquiring title that could be or become exclusive. The result of the railway's contention, if sustained, would be that there could be no condemnation by a telegraph company at all. There is no merit in the assignment of error.

It is a further contention of the railway that the petition for condemnation is unknown to the forms of law, in that it does not seek to have any definite or fixed right of way condemned, but seeks, it is claimed, to have made a judicial contract between the petitioner and defendant, and that, too, for an ambulatory or shifting easement over the right of way of the railway.

By our Act 1885, chapter 66, section 1, it is provided that telegraph companies may construct and maintain a line of telegraph upon, along and parallel to any of the railroads of this State, "provided that the ordinary use of such railroad be not thereby obstructed," and provision is made for the condemnation of easements in the manner prescribed by law for the taking of private property for works of internal improvement. By act 1885, chapter 135, more specific reference was made to the Code sections, relating to the taking of property for public works, which in terms were extended so as to apply to condemnation by such companies.

Western Union Tel. Co. v. Railroad.

The telegraph company, conceiving that it was incumbent on it to construct and hereafter maintain a line of telegraph on the railway right of way that would not materially "obstruct" the ordinary use of that right of way for railroad purposes, embodied in its petition for condemnation, as has been noted, a proposal and agreement on its part to shift the location of its line to any part of the defendant's right of way which may be designated by defendant railway in event of changes in the location of its tracks, depots, etc., now or hereafter to be constructed, and that the poles shall be reset to conform to changes in the grade and curvature of the railway's tracks, etc.

The argument of the railway is that only a fixed and permanent easement may be condemned under our Code provisions—one of specific, definite, and unchanging metes and bounds. However that may have been prior to the later acts (1885) above outlined, we are of opinion that those acts are to be construed to provide for a maintenance of the line of telegraph after condemnation in such a way as will not obstruct the railway's user, as that user may itself be a changing quantity, as time runs and railway traffic increases so as to call for additional facilities. This construction is one favorable to the railway, as we see it, and certainly it is conformable to the needs of commerce and the public weal, which both the railway and the telegraph company were created to serve.

Under this construction the terms set out and acceded to by the petitioner are not to be considered con-

Western Union Tel. Co. v. Railroad.

tract terms. They are not party imposed or court imposed, but law imposed. Any subsequent shifting in the pole line is to be referred for basis to the statute's provision for the safeguarding of the railroad user. It does and will not depend upon the volition of the condemnor. An easement for a telegraph line is to be condemned, subject to such noncontract provisions in favor of the railway. To guarantee the observance of such terms by the petitioner, the petition sets them forth and judgment goes in accord. Similar stipulations in the petition were recognized as proper and enforced, seemingly without question, and therefore without discussion, in *Railroad Co. v. Telegraph Co.*, 101 Tenn., 62, 46 S. W., 571.

The point has been ruled directly in other jurisdictions. In *St. Louis, etc., R. Co. v. Postal Telegraph Co.*, 173 Ill., 508, 51 N. E., 382, the petition contained stipulations of similar character, and it was said:

“These allegations in the petition are in the nature of stipulations, to which the petitioner binds itself. Such stipulations have been held valid by the decisions of this court. *Chicago & Alton Railroad Co. v. Joliet, Lockport & Aurora Railway Co.*, 105 Ill., 388 (44 Am. Rep., 799); *Peoria & Pekin Union Railway Co.*, 105 Ill., 110. Indeed, section 2 of the act in regard to telegraph companies only authorizes such companies to construct lines of telegraph along and upon railroads, and to erect poles for supporting the insulators and wires of their lines, upon condition that such construction and erection are done ‘in such manner and at such

Western Union Tel. Co. v. Railroad.

points, as not to incommode the public use of the railroad.' It is a condition precedent to the erection of the telegraph line, that the public use of the railroad shall not be incommoded."

In *American Telephone, etc. Co. v. St. Louis, etc., R. Co.*, 202 Mo., 656, 684, 101 S. W., 576, 584, it was said:

"It is next contended by defendant's counsel that the easement proposed to be acquired is so lacking in precision and definiteness as to render the proceeding void. They argue that the property to be appropriated must be definitely located and described in the petition and judgment. They say this requirement was disregarded in the case at bar. Is this so? We think not. . . .

"It has been well determined in the cases referred to that reservations, stipulations, promises, and limitations made and placed, as in this case, on the easement by the petition and the judgment may be likened to covenants running with land, and in such case as this run with the easement and are binding upon plaintiff company and its successors. *Railroad v. S. W. Tel. Co.*, 121 Fed., 276, 58 C. C. A., 198; *Railroad v. Postal Tel. Co.*, 173 Ill., 535, 50 N. E., 807, and cases cited; *Railroad v. Post. Tel. Co.*, 76 Miss., 731, 752, 26 South., 370, 45 L. R. A., 223.

"The statutory rule in section 1272, *supra*, limiting the right under the second appropriation to such use as shall not materially interfere with the uses impressed on the primary easement by law, seems to demand a flexibility in the petition and judgment

Western Union Tel. Co. v. Railroad.

which will subserve the useful purpose constituting the life of that statute; and the lack of definiteness complained of by defendant is really but another name for this flexibility. If hereafter defendant is obliged by law or by an advance in the knowledge of railroad-ing to install the block system or any other contrivance or mechanism on its line as a protection to life and property, the judgment should be so worded as to prevent the poles and wires of plaintiff from interfering with the use of such safety appliances in the future."

Obviously cases are not pertinent which hold that, where real property of an ordinary owner is being taken originally for a public use, it is erroneous for the court, in the absence of statutory warrant, to stipulate that the party condemning shall do certain things for the benefit of the owner and to make an award of lessened damages to the owner accordingly. There the taking is in nature unconditional—of a full user.

This being the case, the railway, on that basis, further contends that the Code sections (Code, Shannon, sections 1844-1859, inclusive) do not supply a procedure for the ascertainment and allowance of just compensation to the railway, and that the taking is in consequence without constitutional warrant. Further, that it is entitled to be paid damages in money, and not to have such stipulations, promissory in character, substituted in whole or in part therefor.

We deemed this contention and its several phases to be met substantially by what is said under the assignment of error next above. The telegraph com-

Western Union Tel. Co. v. Railroad.

pany does not pay in mere promises; it pays for the easement taken by it, burdened and qualified at the time of taking with the conditions imposed by the statute.

Another point, much stressed by the railway, is that it was erroneously denied by the court of civil appeals its claim of preferential right in the selection of the portion of its own right of way which it desires to use for the construction of a telegraph line with which to operate its railroad, that court having held that the first right of selection, for its telegraph line, was in the telegraph company.

In support of this insistence on error the railway first urges that it was in the use of the line now occupied by the telegraph poles when, and before, the petition for condemnation was filed, in that it owns one or more wires strung on same, and that this fact gives the preference sought by it. The poles, cross-arms and the other wires are, however, the property of the telegraph company, and the maintenance of the particular wires referred to for railway use was on the line as that of the latter company, so recognized by the railway for many years and throughout all transactions. The occupation prior to petition filed was, then, that of the petitioner company, and the use of two wires was, by contract permission, through or an incident to that occupation by means of the pole line.

In this attitude where lies the preferential right of selection of location on or after the filing of the petition for condemnation which designated for future

Western Union Tel. Co. v. Railroad.

use by the petitioner the location of the line now in existence?

The attempt of the railway to make the selection of that identical route was some months subsequent to the filing of that petition.

When a railway company proceeds to condemn a right of way for its purposes, it is granted the right of preference as to the location of its right of way, over the owner of the soil. 2 Lewis, Eminent Domain (3d Ed.), secs. 460, 604; *Railroad v. Railroad*, 116 Tenn., 500, 532, 95 S. W., 1019.

By what process of reasoning may it be held to have also a preference when another is by the State granted the power of eminent domain in respect to a taking of an easement over the railway's right of way? In each instance there is a subjection of an estate and by the authority of the same power.

In the case of *American Telephone, etc., Co. v. St. Louis, etc., R. Co.*, supra, this language was used in relation to a like claim:

“Defendant may no more question the policy, the good taste and propriety of plaintiff's selection of that route for its poles and lines than could the original proprietors raise such issue with defendant when it selected the route for its railroad. When the legislature delegated to defendant the power of exercising the right of eminent domain in its own behalf, it granted to it by necessary implication (barring malice and fraud) the discretion of selecting its route; and when it granted to plaintiff the same right, it clothed

Western Union Tel. Co. v. Railroad.

that right with the same attribute of discretion—provided always that when an easement for a public use is to be condemned in an existing easement for a public use, the new easement (not being superior to the former) ought not to destroy, or be materially detrimental to, the prior use.”

In *Western Union Tel. Co. v. L. & N. R. Co.* (D. C.), 201 Fed., 946, 949, Evans, D. J., said:

“The suggestion that the defendant may want to devote the very part of its property which complainant seeks to condemn to the construction in the future of a telephone or telegraph line of its own was disposed of in an opinion recently delivered in the condemnation suit, where the defendant, in its answer, made a similar claim under section 1 of the Kentucky act, authorizing condemnations by telegraph companies. While for other reasons overruling a demurrer to a paragraph of the answer which, among other things, set up this claim, the court said that in doing so it by no means intended to intimate that it yielded to ‘the defendant’s contention that the defendant has the first right to choose what part of its right of way shall be taken by the plaintiff or a right to any preference in respect to what it may itself intend hereafter to use for its own telegraph or telephone lines. Our view rather is that no such right or preference exists. The last clause of section 1 of the act does not seem to confer any rights upon the defendant as to a nonexisting telegraph line. The peculiar conditions actually existing in this instance greatly emphasize the view

Western Union Tel. Co. v. Railroad.

we take. Indeed, there would seem to be no justice in allowing the defendant to exclude the plaintiff from keeping its own poles where they now are when the right of way it has had, and which it desires to hold, shall be fully paid for through this action. The party seeking to condemn appears to be given the right to take what it "desires," though this, of course, is subject to the other provisions of the act. That is the object of the suit. The statute does not require that its right to take shall be made subordinate to any purpose of the owner. . . . The taking of one particular part of a thing may involve greater compensation, including greater damages, but it does not otherwise affect or control the right to take what the plaintiff desires.' "

On appeal to the United States circuit court of appeals, sixth circuit, under the style of *Louisville & N. R. Co. v. Western Union Telegraph Co.*, 207 Fed., 1, 124 C. C. A., 573, the court, while declining to express its opinion upon the ultimate merits of this particular question on the ground that it was one for solution by the State courts of Kentucky, yet held that the United States district court had not improperly exercised its discretion in the matter of enjoining the railway company, and said:

"It is true that the supreme court of Georgia (construing, as we do, the language of the opinion in connection with the syllabus prepared by the court) has held that the telegraph company could not condemn lines on both sides of the railway tracks, and that it

Western Union Tel. Co. v. Railroad.

is vested with no preference in the adoption of location, and that it should be enjoined from condemning a right of way selected in good faith by the railway company. See *Western & Atlantic Ry. Co. v. Western Union Telegraph Co.*, 138 Ga., 420, 75 S. E., 471, 42 L. R. A. (N. S.), 225. . . . That decision must be recognized as the law of Georgia, so far as it pertains to appellee's condemnation proceeding pending in that State. But we think it requires no modification of the injunction under review, because, first, appellee has no lines in Georgia on both sides of the railway tracks, and the district court in Kentucky condemnation proceedings took a different view of the question under the Kentucky statutes," etc.

If the ruling in the Georgia case may not fairly be confined within the limits indicated, it may be said to run counter to the trend of authority on this point. *Postal Telegraph Co. v. Oregon, etc., R. Co.* (C. C.), 104 Fed., 623, affirmed 111 Fed., 842, 49 C. C. A., 663; *Union Pacific R. Co. v. Colorado Postal, etc., Co.*, 30 Colo., 133, 69 Pac., 564, 97 Am. St. Rep., 106; 2 Lewis, *Eminent Domain* (3d Ed.), sec. 604.

We deem the true rule to be that property already dedicated to a public use is in this respect on the same plane as other property, provided there does not exist a condition that would prevent condemnation—an interference with the first public use by the second so material as to "obstruct" or seriously and extraordinarily impair the use for ordinary railway purposes,

Western Union Tel. Co. v. Railroad.

including telegraphic communication by means of the railway's own line of wires.

If the interference goes to the extent of so obstructing the earlier use, the power to condemn is lacking; but the theory underlying our statute is that when the interference does not go that far, the inconvenience and impairment may be compensated for in damages and the taking for the second use permitted.

The circuit judge held against the defense raised by the railway to the effect that a pole line of the telegraph company placed on the right of way would not leave safe and suitable space for a line of telegraph for defendant's purposes, and the court of civil appeals ruled that "the portion of the right of way selected by the telegraph company in this case will not, as the proof shows, materially interfere with, or obstruct, the ordinary travel on this railroad," and the context shows that by this was meant that the ordinary use for all railroad purposes would not be interfered with materially. Without going into a discussion of the proof in detail, we are of opinion that this ruling was correct. Particularly do we think it demonstrated by the testimony adduced that the railway may, with reasonable safety and convenience, construct and maintain its own telegraph line on the Nashville division on that side of the main track where stands the poles of the line of the Cumberland Telephone Company, and on the Paducah division on the opposite side of the track from the line of petitioner.

Western Union Tel. Co. v. Railroad.

The court of civil appeals further upheld the selection by the telegraph company of the lines for many years, and yet, by it maintained on the right of way of the two divisions of railway, where they are now located, and this ruling being in accord with the authorities as to the right of selection, above discussed, will not be interfered with.

This brings us to a consideration of whether the court of civil appeals was in error in its judgment awarding to the railway company only nominal damages for the easements thus appropriated. Although that court affirmed a similar ruling of the trial judge, it said in its opinion that "this, to us, has been the most troublesome question to determine," and two of the members of that learned court, Judges Wilson and Higgins, dissented from the ruling. We think the majority of that court was led to its conclusion (so far as the Nashville division is concerned) by a mistaken construction or application of the case of *Railroad v. Telegraph Co.*, 101 Tenn., 62, 46 S. W., 571. It was held in that case by this court, on the facts there appearing, that nominal damages were properly allowed in a case of appropriation of a telegraph line on a railroad right of way. But it was not meant to be held that as a matter of law in no event would the rule of substantial damages be applicable to such an appropriation. On the contrary it was there said:

"It is not insisted in this case that the use of the right of way, and construction of the telegraph line, will be any detriment or obstruction to the railroad,

Western Union Tel. Co. v. Railroad.

but, on the contrary, it is shown that it would be a benefit and convenience.”

Recurring to what was said above in the discussion of the question of preferential right of selection, the law recognizes that there may be an interference with the railway's use of such a degree of materiality as to require compensation, though it fail to obstruct or supersede such earlier use. In other words the interference by the subsequent public use with the former use may be so slight as to indicate nominal damages, it may be material to the point of indicating substantial damages, and it may reach the degree of obstruction, with the result of a denial of condemnation to the telegraph company.

We think the facts of the present case bring it within the second class, so far as the line along the Nashville division is concerned, and that the lower court erred in the rulings that excluded testimony competent to show the injury and inconvenience to be suffered by the railway by reason of the interference to be occasioned by the pole lines on the easement of way of the telegraph company. *Cleveland, etc., R. Co. v. Ohio Postal Telegraph Co.*, 68 Ohio St., 306, 67 N. E., 890, 62 L. R. A., 941; *American Telephone, etc., Co. v. St. Louis, etc., Co.*, supra.

We are of the further view that it was competent for the railway to show, if it could, that the taking of the existing telegraph line on that division by the condemnor compels it, the railway, to construct a telegraph line, necessary to be built presently, in a loca-

Western Union Tel. Co. v. Railroad.

tion (even when made at the next best place) less desirable and more expensive, as well as for it to show damages, if any, by way of direct nonobstructing interference of petitioner's line with the railroad user.

The argument of the telegraph company to the contrary is that a condition of its being allowed to take at all is that it shall remove or readjust its line when it shall become an interference; but this is not maintainable under our holding favorable to that company on another point, to the extent of defeating the allowance of substantial damages. The proof offered indicated that the telegraph line on the Nashville division will be at the outset an interference that will incommode and injure the defendant to a substantial degree. Only such proof as tends in this direction is meant to be here indicated to be competent, in relation to that line.

As to the line sought to be condemned along the Paducah division: Here there exists no telephone line on the side of the track opposite to the existing telegraph line, and the latter is so far from the track and from any telegraph line reasonably and practicably to be constructed by the railway that the ruling as to measurement of damages as nominal under the doctrine of the case of *Railroad v. Telegraph Co.*, 101 Tenn., 62, 46 S. W., 571, was in our opinion warranted. The rule of that case on this point has been approved in several other jurisdictions. *Atlantic, etc., R. Co. v. Postal Telegraph Co.*, 120 Ga., 268, 48 S. E., 15, 1 Ann.

Western Union Tel. Co. v. Railroad.

Cas., 734; *Mobile, etc., R. Co. v. Postal Telegraph Co.*, 120 Ala., 21, 24 South., 408; *Western Union Telegraph Co. v. South, etc., R. Co.*, 184 Ala., 66, 62 South., 788; *Mobile, etc., R. Co. v. Postal Telegraph Co.*, 76 Miss., 731, 26 South, 370, 45 L. R. A., 223; *Postal Telegraph Co. v. Oregon, etc., R. Co.* (C. C.), 114 Fed., 787, and cases therein cited.

The assignment of errors, as shaped, does not call for rulings by us on specific offerings of evidence by the railway tending to show in detail how the railway will be damaged by petitioner's line on the Nashville division, and necessarily they have been dealt with broadly.

The circuit judge erred in giving the jury peremptory instructions to award nominal damages in so far as it is above shown; and the court of civil appeals erred on the same point. Reversed and remanded, for further proceedings in accord with the rulings embodied in this opinion.

The cost of the appeal will be paid by the telegraph company.

People's Nat. Bank v. Corse.

PEOPLE'S NATIONAL BANK v. JAMES CORSE.

(*Nashville*. December Term, 1915.)

1. UNITED STATES. Contracts. Bond of contractor. Liability on.

A bank which furnishes money to a federal contractor to pay for materials or labor does not come within a bond guaranteeing performance of the contract, and conditioned that the contractor shall promptly make payment to all persons supplying labor or material. (*Post*, p. 723.)

Cases cited and approved: *United States v. Rundle*, 107 Fed., 227; *Illinois Surety Co. v. City of Gallion* (D. C.), 211 Fed., 161; *Hardaway v. National Surety Co.*, 211 U. S., 552; *McDonald v. Railroad*, 93 Tenn., 281; *Smith v. Neilson*, 81 Tenn., 461.

2. SUBROGATION. Right to subrogation. Volunteers.

Where a surety on the bond of a government contractor completed the work, its right to subrogation to the rights of the federal government was superior to the right of a bank which advanced money to the contractor for payment of labor and materials, though the bond guaranteed performance, and was conditioned upon payment of all claims for labor and material. (*Post*, pp. 723, 724.)

Case cited and approved: *Henningsen v. U. S. Fidelity, etc., Co.*, 208 U. S., 404.

3. UNITED STATES. Priorities. Right to.

The United States' right of priority in payment of debts due it is not an attribute of sovereignty, but depends on the acts of Congress. (*Post*, pp. 724-726.)

Cases cited and approved: *Den v. Deaderick*, 9 Tenn., 125; *Camman v. Bridgewater, etc., Co.*, 12 N. J. Law, 84; *United States v. State Bank*, 6 Pet. (31 U. S.), 29; *Re Devlin* (D. C.),

People's Nat. Bank v. Corse.

180 Fed., 170; U. S. v. Hooe, 7 U. S., 73; Beaston v. Farmers' Bank, 12 Pet. (37 U. S.), 102; Watkins v. Otis, 2 Pick. (19 Mass.), 88; U. S. v. Williamson, 5 Dillon, 275; U. S. v. Canal Bank, 3 Story, 79; State v. Foster, 29 L. R. A. 226.

4. UNITED STATES. Priorities. Liens.

Under Revised Statutes, section 3466 (U. S. Comp. St. 1913, section 6372), providing that, where a debtor is insolvent or the property of an absconding debtor is attached, claims due the United States shall first be satisfied, the federal government has no lien on the property of its debtors as such. (*Post*, pp. 724-726.)

5. UNITED STATES. Priorities. Right to. "Absent debtor."

The property of a nonresident government contractor was attached in the State Courts. The surety on the contractor's bond replevied it, and, completing the building, claimed subrogation to any priority of the federal government, under Rev. St., sections 3466, 3468 (U. S. Comp. St. 1913, sections 6372, 6374), declaring that whenever and person indebted to the United States is insolvent, or when the estate of an absent debtor is attached, debts due the United States shall be first satisfied, and that whenever the principal in any bond given the United States is insolvent, and the surety pays to the United States money due, the surety shall have like priority. *Held*, that though a nonresident debtor be deemed an absent debtor within the statute, yet the United States had no priority, as the attachment did not operate as a sequestration of the contractor's property for distribution among his creditors, and hence the surety had none. (*Post*, pp. 724-726.)

6. ATTACHMENT. Replevy bond. Judgment.

In attachment, where defendant intervened, replevying the property, under Shannon's Code, section 5269, sections 5131-5144, relating to actions of replevin, and providing for alternative judgments for monetary value of property or its return, are not applicable, and, judgment going against the intervener, there should be no provision for return. (*Post*, pp. 726, 727.)

Code cited and construed: Secs. 5131-5144, 5269 (S.).

133 Tenn. 46

People's Nat. Bank v. Corse.

FROM ROBERTSON

Appeal from the Chancery Court of Robertson County.—J. W. STOUT, Chancellor.

J. E. GARNER and SMITH & BERRY, for appellant.

TRUE & DORSEY, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The United States let a contract for the erection of a post office building in Springfield to Corse, who executed a bond to the government, with the New England Casualty Company as surety. This bond guaranteed the performance of the contract, and contained a clause to the effect that the contractor should promptly make payment to all persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Corse borrowed money of complainant bank, which was used to pay for such labor and material. The bank filed a bill of attachment on the ground that Corse was a nonresident of the State, and caused a lot of materials to be attached, which materials were at the time stored near the public building, then in course of construction, and in railway cars, unloaded at the time, as the property of Corse. It had been ordered by and consigned to him.

People's Nat. Bank v. Corse.

The surety company in that cause filed its petition of intervention to set up its claims, and executed a replevy bond in a sum equal to the value of the material for the release of the same from the levy of the attachment. The contentions, outlined below, were so far ruled in favor of the bank by the chancellor as that a recovery on the bond for its amount was allowed.

One of the claims of the surety company is that it is entitled to be subrogated to the right of the United States, it having completed the building and complied with the contract of its principal, Corse.

A claim of the appellee bank is that the surety must fail, because the bank was itself entitled to look to the bond and to appellant as surety thereon, on account of the fact that it advanced money to contractor Corse which went to pay for materials wrought into the building. This is not maintainable. Money furnished by a bank for the specific purpose of paying for materials or labor is not thereby placed within the protection of the provisions of such a bond. *United States, for use, etc., v. Rundle*, 107 Fed., 227, 46 C. C. A., 251, 52 L. R. A., 505; *Illinois Surety Co. v. City of Galion* (D. C.), 211 Fed., 161. And see *Hardaway v. National Surety Co.*, 211 U. S., 552, 29 Sup. Ct., 202, 53 L. Ed., 321, affirming 150 Fed., 465, 80 C. C. A., 283. These decisions proceed upon principles recognized in our cases. *McDonald v. Railroad*, 93 Tenn., 281, 290, 24 S. W., 252; *Smith v. Neilson*, 13 Lea (81 Tenn.), 461.

The equity of the surety company, entitling it to subrogation, is held superior to that of such a volun-

People's Nat. Bank v. Corse.

teer who had advanced money to the contractor. *Henningsen v. U. S. Fidelity, etc., Co.*, 208 U. S., 404, 28 Sup. Ct., 389, 52 L. Ed., 547, affirming 143 Fed., 810, 74 C. C. A., 484.

The main contention of the surety for error in the chancellor's decree is that, under the federal statute, the bank could not by its attachment gain a lien on or title to the property levied on which would be superior to appellant's right of subrogation to the priority of the United States.

This claim is based on sections 3466 and 3468 of the Revised Statutes of the United States (U. S. Comp. St. 1913, sections 6372, 6374), as follows:

“Sec. 3466. Whenever any person indebted to the United States is insolvent, . . . the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.”

“Sec. 3468. Whenever the principal in any bond given to the United States is insolvent, . . . and . . . any surety on the bond . . . pays to the United States the money due upon such bond, such surety . . . shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent . . . as is secured

People's Nat. Bank v. Corse.

to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon."

It is urged that Corse was insolvent, and that the attachment by the bank was based on his nonresidence, which is claimed to be the equivalent of the term "absent debtor" in section 3466.

If the words "absent debtor" may be construed to mean nonresident (*Den v. Deaderick*, 1 Yerg. [9 Tenn.], 125, 135, and *Camman v. Bridgewater, etc., Co.*, 12 N. J. Law, 84, holding the terms not to be synonymous), and not merely to imply a resident who has removed himself from his home, we think it clearly established that the United States did not have priority, or a prior claim to the property, that prevented the bank's attachment taking precedence.

The right of the United States to priority does not rest, as does that of the States, upon any prerogative of sovereignty, but is based exclusively on acts of Congress. *United States v. State Bank*, 6 Pet. (31 U. S.), 29, 8 L. Ed., 308; *Re Devlin* (D. C.), 180 Fed., 170.

The federal courts have held that the above statute does not create a lien on the property as such. *U. S. v. Hooe*, 3 Cranch (7 U. S.), 73, 2 L. Ed., 370; *Beaston v. Farmers' Bank*, 12 Pet. (37 U. S.), 102, 9 L. Ed. 1017.

When the statute was enacted, the effect of an attachment of any goods of a debtor was, in some of the States of the Union, to cause a distribution among all

People's Nat. Bank v. Corse.

creditors, through the medium of a trustee for the benefit of all creditors. From an early day, the statute here involved was construed to operate to give priority to the United States only where by the law the property of the debtor was, upon being attached, thus sequestered for distribution among all of his creditors; and where, as in this State, the attaching creditor fixes a lien upon the property (subject to be perfected by judgment later entered) that inures to his own benefit, and where only the property attached is affected, the United States has no priority that overrides the lien of the attachment. *Watkins v. Otis*, 2 Pick. (19 Mass.), 88; *U. S. v. Williamson*, 5 Dillon, 275; *U. S. v. Canal Bank*, 3 Story, 79, 25 Fed. Cas., No. 14,715; *Beaston v. Farmers' Bank*, supra; note to *State v. Foster*, 29 L. R. A., 226, 234; 29 Cyc., 750.

If it be conceded that appellee would have a right to be subrogated to the priority of the United States upon payment of the principal debtor's obligation, under the statute or the common-law rule that he who pays the debtor's debt to the sovereign succeeds by subrogation, to the priority of the latter, the relief asked by the intervening petition must be denied for that there is here no right to priority in the United States.

The intervener and appellant contends that the chancellor was in error, in rendering a money judgment against it on the bond without providing, in the alternative, for a return of the property replevied, so far as it was not wrought into the building.

People's Nat. Bank v. Corse.

In this there is a failure to distinguish a réplevin bond in an action of replevin (Code, Shannon, sections 5131-5144) and a replevy bond such as this (Code, Shannon, section 5269), which makes no provision for a return of the property affected,

In event of its being cast in the suit, a decree incorporating a judgment against the casualty company on the replevy bond for the debt, without any provision for a return of any part of the property, was therefore the correct one. Gibson's Suits in Chancery (2d Ed.), sec. 886.

We are of the opinion that the chancellor properly decreed, on the above contentions of the casualty company, in favor of the bank. Affirmed.

INDEX.

ACTIONS, RIGHT AND CAUSE.

1. *Death. Actions for cause of death. Nature.*

The right of action for wrongful death given by Shannon's Code, sec. 4025 *et seq.*, is that which the deceased would have had if he had lived, and recovery is in right of the deceased. *Sharp v. Railroad*, 1.

2. *Death. Actions for wrongful death. Law governing.*

A right of action for wrongful death is governed by the laws of the State where the injury occurred. *Ib.*

3. *Railroads. Actions for injury or death. Confusing instructions.*

In an action for the death of a person struck by a railroad train while standing at a point on a sharp curve, it was the theory of the company sustained by proof that a south-bound train was so interposed between deceased and the engine which struck him that deceased and his companion could not be seen from the engine. Plaintiff requested a charge that, if deceased could have been seen on the track by one on the lookout ahead before the view was cut off by the south-bound train, the law required that he be seen, and, though the south-bound train subsequently cut off the view, it was the duty of those operating the train to reduce the speed and bring the train under such control as to make certain that it could be stopped after he could again be seen and before striking him. The court so charged, with the modification that, if deceased again appeared upon the track, it was the duty of those on the engine not to so control the train as to be certain that it could be stopped before striking deceased, but to sound the alarm, put down the brakes, and use every possible means to stop the train and prevent the accident. *Held*, that this instruction, with the modification, was at least confusing to the jury. *Railroad v. Wright*, 74.

4. *Carriers. Carriage of goods. Relief. Surprise and imposition.*

Complainant railroad, which delivered a carload of beans to defendant upon his innocent presentation of a false bill of lading made by his principal, after recovery by the holder of the true bill, might recover against the defendant, on the ground that a party's innocent misrepresentation of a material fact by mistake upon which either party is induced to act

 ACTS CITED AND CONSTRUED.

ACTIONS, RIGHT AND CAUSE—Continued.

is ground for relief in equity as a willful and false assertion, which in either case operates as a surprise and imposition. *Railroad v. McKay & Morgan*, 503.

5. *Carriers. Carriage of goods. Relief. Loss between innocent parties.*

Complainant in such case might recover on the principle that, where one of two innocent parties must suffer, that one by whose act the loss was occasioned must bear it. *Ib.*

6. *Carriers. Delivery of goods. Fraud.*

Where a carrier through mistake or fraud has been induced to deliver goods to the wrong person, it may maintain an action against such person for damages. *Ib.*

7. *Banks and banking. Officers and agents. Right of action. Immaterial matter.*

The right of action of the receiver of an insolvent bank at the instance of the chancellor to recover of officers and directors for loans negligently made was not impaired by the fact that, if all the assets in the receiver's hands should be realized and the whole demand made against the directors be successfully prosecuted, there would not be enough assets produced to satisfy the bank's debts, since the bank, owning the rights sued on, was entitled to collect not only for the payment of creditors but for distribution among stockholders. *Green v. Officers & Directors of Trust Co.*, 609.

ACTS CITED AND CONSTRUED

1819, ch. 28. Ejectment. Actions. Pleadings. Sufficiency. *Jones v. Mining & Mfg. Co.*, 161.

1831, ch. 24. Statutes. Revisions and compilations. Construction. *Sharp v. Railroad*, 1.

1841-42, ch. 69. Statutes. Revisions and compilations. Construction. *Ib.*

1848, ch. 265. Telegraphs and telephones. Extension of line. Right to make. *Western Union Tel. Co. v. Railroad*, 691.

1851, ch. 98. Telegraphs and telephones. Extension of line. Right to make. *Ib.*

1853, ch. 471. Telegraphs and telephones. Extension of line. Right to make. *Ib.*

1868-69, ch. 14. Eminent domain. Private road. Statutes. Constitutionality. Roads. Character of way. *Bashor v. Bowman*, 269.

ACTS CITED AND CONSTRUED.

ACTS CITED AND CONSTRUED—Continued.

- 1871, ch. 78, sec. 2. Death. Actions for wrongful death. Law governing. *Sharp v. Railroad*, 1.
- 1871, ch. 139. Statutes. Enactment. Return by governor. "Adjournment." *Johnson City v. Electric Co.*, 632.
- 1875, ch. 4. Jury. Jury trial. Demand. *Life & Acc. Ins. Co. v. Jordan*, 495.
- 1881, ch. 126. Insurance. Life companies. Right to erect building. *State Life Ins. Co. v. Dunbar*, 331.
- 1885, ch. 66, sec. 1, ch. 135. Eminent domain. Telegraph and railway. Ways. Condemnation. *Western Union Tel Co. v. Railroad*, 691.
- 1889, ch. 94. Bills and notes. Indorser's liability. *Cohn v. Hitt*, 466.
- 1889, ch. 220. Jury. Jury trial. Demand. *Life & Acc. Ins. Co. v. Jordan*, 495.
- 1897, ch. 57. Fish. Preservation. Statutes. Implied repeal. *Bivens v. State*, 40.
- 1897, ch. 77. Bills and notes. Validity. Illegal transactions. Recital of consideration. Note for patent right. *Cohn v. Lunn*, 547.
- 1899, ch. 94. Bills and notes. Defenses available against innocent holders. *Edwards v. Fruit Products Co.*, 142.
- 1899, ch. 94, sec. 8, subd. 5. Banks and banking. Certificates of deposit. Construction. "Or." *Smith v. Haire*, 343.
- 1901, ch. 15. Limitation of actions. Exceptions. Repeal of excepting statutes. Effect. Validity. *Jones v. Mining & Mfg. Co.*, 160.
- 1901, ch. 133. Fraudulent conveyances. Partial validity of transaction. Right of grantee. Resulting trusts. *Elledge v. Anderson*, 478.
- 1903, ch. 317. Death. Actions for wrongful death. Law governing. *Sharp v. Railroad*, 1.
- 1905, ch. 534. Constitutional law. Classification. Population. Turnpike road. Statutes. "General law." "Special law." Constitutionality. *State v. Turnpike Co.*, 446.
- 1907, ch. 82. Constitutional law. Constitutional questions. Necessity of decision. *Memphis St. Ry. Co. v. Rapid Transit Co.*, 99.
- 1907, ch. 82. Certiorari. Review. "Final judgment." *Burnett v. Layman*, 323.
- 1907, ch. 82. Certiorari. Scope of review. Petition. Assignments of error. Necessity. *McKay v. Railroad*, 590.

ACTS CITED AND CONSTRUED.

ACTS CITED AND CONSTRUED—Continued.

- 1907, ch. 242. Constitutional law. Classification. Population. Turnpike road. Statutes. "General law." "Special law." Constitutionality. *State v. Turnpike Co.*, 446.
- 1907, ch. 458. Insurance. Life companies. Right to erect building. *State Life Ins. Co. v. Dunbar*, 331.
- 1907, ch. 489. Fish. Preservation. Statutes. Implied repeal. *Bivens v. State*, 40.
- 1909, ch. 121. Taxation. Exemptions. Municipal corporations. Property. "Public purpose." Used for public purposes. *Johnson City v. Weeks*, 277.
- 1909, ch. 185. Drains. Drainage districts. County courts. *In re Drainage District*, 684.
- 1911, ch. 58. Infants. Delinquent children. Statutes. Validity. *Childress v. State*, 121.
- 1911, ch. 58. Infants. Crimes. Criminal procedure. "Delinquent child." *Sams v. State*, 188.
- 1913, ch. 26. Descent and distribution. Wife's personalty. Husband's rights. Statutes. *Baker v. Dew*, 126.
- 1913, ch. 26. Husband and wife. Estates by the entirety. Statute. Construction. *Bennett v. Hutchens*, 65.
- 1913, ch. 26. Husband and wife. Actions for torts. Statutory provisions. *Lillenkamp v. Rippetoe*, 57.
- 1913, ch. 26. Statutes. Titles. Plurality of subjects. Validity. Counties. Powers of county board. Regular sessions. Highway bonds. Time of redemption. Notice. Statutory requirements. *Walmsley v. Franklin Co.*, 579.
- 1915, ch. 23. Statutes. Titles. Plurality of subjects. Validity. Counties. Powers of county board. Regular sessions. *Ib.*
- 1915, ch. 60. Constitutional law. Construction. Carriers. Class legislation. Regulation of jitneys. Private conveyances. Street cars. Taxicabs. *City of Memphis v. State*, 83.
- 1915, ch. 60. Constitutional law. Constitutional questions. Necessity of decision. Licenses. Carriers. Jitneys. *Memphis St. Ry. Co. v. Rapid Transit Co.*, 99.
- 1915, ch. 61. Drains. Drainage districts. County courts. *In re Drainage District*, 684.
- 1915, ch. 384. Counties. Partition. Constitution. Statutes. *Giles Co. v. Marshall Co.*, 414.
- 1915, ch. 682. Statutes. Plurality of subjects. *Raulston v. Marion Co.*, 433.

ACCESSION—ATTACHMENT.

ACCESSION

Doctrine. Effect of.

Where the purchaser of an automobile, title to which was retained by the seller, fitted the machine with tire casing, and the seller on nonpayment retook the machine, title to the tire casings passed to the seller, the seller of the casings not having retained title, for such is the rule of "accession," which denotes the right of the owner of corporeal property, real or personal, to any increase thereof from any cause, either actual or artificial. *Tire & Vulcanizing Co. v. Auto Storage Co.*, 515.

APPEAL AND ERROR.

1. *Matters reviewable. "Cross-bill."*

A "cross-bill" is auxiliary to and dependent on the original litigation and incorporates itself within and becomes a part of the original bill, so that it is one suit, and so wedded together are the two bills that an appeal takes them both up. *McDowell v. Hunt Contracting Co.*, 438.

2. *Review. Findings.*

Where complainant did not move for a new trial and preserve the evidence in a bill of exceptions, the finding of the jury against him on issues submitted in an equity case must be deemed by the appellate court as warranted by the evidence. *Minton v. Wilkerson*, 484.

3. *Record. Necessity of bill of exceptions.*

In the absence of an assignment of error and a bill of exceptions presenting the question of the refusal of an amendment, the matter cannot be reviewed, though the action appeared in the motion for new trial; that being a mere pleading and not evidence of what occurred on the trial. *Type & Elec. Foundry v. Carter*, 489.

4. *Harmless error. Instructions.*

In an action for the price of goods sold, where the verdict was manifestly reached on the ground that the buyer had a right to rescind, the charge of the trial court on the defense of set-off or recoupment, as to which no damages were shown upon which the verdict might have been reached, was not prejudicial. *Monogram Mfgs. v. Johnson*, 571.

ATTACHMENT

Replevy bond. Judgment.

In attachment, where defendant intervened, replevying the property, under Shannon's Code, section 5269, sections 5131-

ATTORNEYS—BANKS AND BANKING.

ATTACHMENT—Continued.

5144, relating to actions of replevin, and providing for alternative judgments for monetary value of property or its return, are not applicable, and, judgment going against the intervener, there should be no provision for return. *People's Nat. Bank v. Corse*, 720.

ATTORNEYS

Divorce. Allowances. Attorney's fee.

Attorneys for the wife in her successful suit for absolute divorce against her husband were entitled to a fee of \$5,000 from the husband though they could have procured a divorce upon the ground of abandonment alone with very little trouble, but in fact charged cruel and inhuman treatment and infidelity as well. *Winslow v. Winslow*, 663.

BANKS AND BANKING

1. *Certificates of deposit. Construction. "Or."*

Notwithstanding Acts 1899, ch. 94, sec. 8, subd. 5, declaring that a promissory note may be made payable to one or some of several payees, a certificate of deposit payable to a husband or wife, naming them, must, in view of the fact that the husband used the word "or" as synonymous with "and," be construed as payable to the husband and wife. *Smith v. Haire*, 343.

2. *Officers and directors. Liability to bank. Premature character.*

A bill was prematurely brought at the chancellor's direction by the receiver of an insolvent bank against its officers and directors to recover for loans negligently made by them, whereby the insolvency was brought about, where the debtors were not wholly insolvent when the suit was brought, but collections might yet be made from them, since there can be no recovery for negligence without damages resulting therefrom, but it would be otherwise where such insolvency existed. *Green v. Officers & Directors of Trust Co.*, 609.

3. *Officers and agents. Liability to bank. Negligence as to loans.*

A bill filed at the instance of the chancellor by the receiver of an insolvent bank to recover of officers and directors for loans negligently made was maintainable although the assets of the bank were not first exhausted, since the suit was by the bank itself, i. e., by its receiver in its right, to hold its agents, the directors, liable for negligence, and the measure of dam-

BASTARDS—BILLS AND NOTES.

BANKS AND BANKING—Continued.

ages was the amount of the negligent loans finally lost after due efforts to collect. *Ib.*

4. *Officers and agents. Liability to bank at common law.*

Under the common law a bank itself has the right to redress for injuries inflicted upon it by the acts denounced by Shannon's Code, sections 2067, 2068, and 3242, providing that intentional fraud in failing to comply with the articles of incorporation, or in deceiving the public or individuals in relation to their liabilities, subjects all officers, stockholders, or directors, knowingly participating therein, to damages at the suit of any person injured; that the diversion of the funds of the banks, the payments of dividends leaving insufficient funds to meet its liabilities, the keeping of false books or accounts, whereby any one is injured, and the making and publishing of false reports, are such frauds as will subject those actively concerned to damages at the suit of any person injured; and that any director of any bank who shall be guilty of any fraud or willful mismanagement by which loss shall fall upon its creditors shall be individually liable for such loss. *Ib.*

BASTARDS

See LEGITIMACY

BILLS AND NOTES

1. *Defenses available against innocent holders.*

Under Negotiable Instruments Law (Acts 1899, ch. 94) sec. 60, providing that the maker of a negotiable instrument, by making it, engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse, the innocent holder of a negotiable note may recover thereon, though the payee was a foreign corporation, which, though required to do so, had not complied with the law in respect to filing a copy of its charter of incorporation.

Edwards v. Fruit Products Co., 142.

2. *Indorsers. Rights of.*

A prior indorser of a note payable to a given bank is not discharged because the maker took the note to a discount broker, engaged him to secure its discount and the broker in the usual course of business indorsed the same, for there was no diversion of the proceeds of the note and the liability of the first indorser was in no way changed. *Cohn v. Hitt*, 466.

BILLS AND NOTES.

BILLS AND NOTES—Continued.

3. *Indorser's liability.*

Negotiable Instruments Law (Laws 1899, ch. 94) sec. 64, declares that a person who places his signature in blank upon an instrument before delivery is liable as an indorser, while section 68 declares that, as respects one another, indorsers are liable *prima facie* in the order in which they indorse, but evidence is admissible to show that as between themselves they have agreed otherwise. Defendant indorsed a note for the accommodation of the maker and thereafter, to secure its discount, complainant also indorsed it. There was no evidence of any agreement whereby complainant should be primarily liable. *Held*, that as there was no diversion of the note, defendant was, both under the statute and at common law, liable to complainant, who was forced to pay the note at maturity. *Cohn v. Hitt*, 466.

4. *Liability of indorser. Stipulation for attorney's fees.*

An indorser of a note, stipulating for payment of attorney's fees in case of suit, though he be an accommodation indorser, is liable for such fees, especially where he waives demand, protest, and notice. *Franklin v. The Duncan*, 472.

5. *Guaranty. Liability of guarantor. Attorney's fees.*

The liability of a guarantor of the payment of a note, stipulating for payment of attorney's fees in case in suit, included the liability of the maker for payment of the fees, especially where the contract of guaranty specified that the guarantor accepted all the provisions of the note. *Ib.*

6. *Attorney's fees. Necessity of suit.*

The holder of a mortgage note, providing for payment of attorneys' fees if the note was placed "in the hands of an attorney for collection, has to be sued upon, or if litigation arises in the course of its collection," was entitled to have the fees allowed, over objection that its suit was needless, since foreclosure out of court was provided for in the mortgage, where a general creditors' bill was filed against the maker of the note and an injunction granted therein, which operated to enjoin the holder of the note from foreclosing the mortgage except in that cause, and, on the holder's intervening to set up its claim by cross-bill, the complainant answered, denying the validity of the mortgage. *Ib.*

7. *Validity. Illegal transactions.*

A note executed in violation of a penal statute is absolutely void not only between the parties, but even as against an innocent holder. *Cohn v. Lunn*, 547.

CARRIERS.

BILLS AND NOTES—Continued.

8. *Recital of consideration. Note for patent right.*

Where a party sold defendant a quantity of patented articles and granted him an exclusive right to sell such articles, and such others as he might order, in certain territory, and in consideration of the articles purchased, and the exclusive right to sell, defendant executed his note for \$495. the note was not invalidated by noncompliance with Acts 1897, ch. 77, sec. 1, making it unlawful to take or receive any note for the sale of a patent right or any interest therein unless it shall clearly appear upon the face of the note that it is given in the purchase of a patent right or interest therein, as a license to sell patented articles conveys no interest in the patent. *Ib.*

CARRIERS

1. *Constitutional law. Class legislation. Regulation of jitneys. Private conveyances.*

Acts 1915, ch. 60, regulating jitneys as common carriers, and prohibiting their operation, except upon prescribed conditions, does not make an arbitrary classification between jitneys and privately owned automobiles, since the uses and character of operation of the two classes are distinct. *City of Memphis v. State*, 83.

2. *Constitutional law. Class legislation. Regulating jitneys. Street cars.*

Acts 1915, ch. 60, regulating jitneys as common carriers, and prohibiting their operation, except upon prescribed conditions, does not make an arbitrary classification between jitney busses and street railway cars, since the jitney runs upon no track, and is less substantial and more dangerous than the street car, thus presenting essential differences, properly the subject of classification. *Ib.*

3. *Constitutional law. Class legislation. Regulation of jitneys. Taxicabs.*

Acts 1915, ch. 60, regulating jitneys as common carriers, and prohibiting their operation, except upon described conditions, does not make an arbitrary classification between jitneys and taxicabs, since taxicabs are for hire at a fare proportioned to the length of the trips of the several passengers, without regard to route, while the jitney carries passengers upon a designated route, and the investments in the two classes of machines are widely different. *Ib.*

CARRIERS.

CARRIERS—Continued.

4. *Carriers of persons. "Jitneys."*

A "jitney" is a self-propelled vehicle, other than a street car, traversing the public streets between certain definite points or termini, and, as a common carrier, conveying passengers at a five-cent or some small fare, between such termini and intermediate points, and so held out, advertised, or announced. *City of Memphis v. State*, 83.

5. *Licenses. Jitneys.*

Under Acts 1915, ch. 60, making jitneys common carriers, and requiring them, under ordinances of the cities or towns, to file bonds and perform the conditions of the statute and ordinances, a jitney company is altogether without right to do business on the streets of a city, where the city has passed no ordinance pursuant to the act, and the company has failed to procure any license or execute any bond under the act. *Memphis St. Ry. Co. v. Rapid Transit Co.*, 99.

6. *Carriage of goods. Bill of lading. Delivery.*

A carrier is only authorized to deliver goods upon presentation of the genuine bill of lading, and any delivery made with that bill of lading outstanding is at its peril, and renders it liable to the holder of the genuine bill. *Railroad v. McKay & Morgan*, 503.

7. *Carriage of goods. Relief. Surprise and imposition.*

Complainant railroad, which delivered a carload of beans to defendant upon his innocent presentation of a false bill of lading made by his principal, after recovery by the holder of the true bill, might recover against the defendant, on the ground that a party's innocent misrepresentation of a material fact by mistake upon which either party is induced to act is ground for relief in equity as a willful and false assertion, which in either case operates as a surprise and imposition. *Ib.*

8. *Express messenger. Release of carrier's liability. Effect.*

Plaintiff, who by contract with an express company for employment as messenger assumed the risk of injury, and released his claims against carriers for liability for personal injury and ratified the company's contracts with carriers, and agreed to save the company harmless as to any claims for personal injury, and who received the employment as a consideration, was bound by his contract. *McKay v. Railroad*, 590.

CERTIORARI.

CARRIERS—Continued.

9. *Passenger. Express messenger.*

Under such contract of employment, the employee, injured by wreck on defendant's line, did not stand to the defendant in the relation of a passenger, so as to make defendant liable for his injury. *Ib.*

See CONTRACTS

CERTIORARI

1. *Review. "Final judgment."*

Acts 1907, ch. 82, provides that *certiorari* shall not be issued by the supreme court to the court of civil appeals after a lapse of ninety days from the final judgment or decree of that court. During the 1914 term of the court of civil appeals, after affirmance of a judgment for defendant plaintiff died, and a suggestion of death being made, it was attempted to revive the suit in the name of plaintiff's widow. A petition for *certiorari* prosecuted in the name of the widow and next of kin was denied by the supreme court and at the 1915 term of the court of civil appeals, an administrator having qualified, the suit was revived in the name of the administrator, who brought *certiorari*. Shannon's Code, sec. 4570, declares that the intervention of a term between the death of a party and the qualification of a personal representative shall not work an abatement or discontinuance of the suit, nor shall the suit abate or discontinue for the death of either party until the second term after the death has been suggested and entry to that effect made of record. *Held*, that the suggestion of death prevented the judgment of the court of civil appeals from becoming "final," though the attempted revival was a nullity, and hence the final judgment of the court of civil appeals was the order of revivor in the administrator's name, so petition for *certiorari* could be taken within ninety days therefrom. *Burnett v. Layman*, 323.

2. *Scope of review. Petition. Assignments of error. Necessity.*

Under Acts 1907, ch. 82, creating the court of civil appeals and regulating the method of reviewing its judgments, on petition by defendant for *certiorari* to review the opinion and judgment of the court of civil appeals, which on some questions was favorable to the defendant and against the plaintiff, plaintiff, who presented no petition for *certiorari* and no assignment of errors, was concluded by the court's rulings adverse to him. *McKay v. Railroad*, 590.

 CHATTEL MORTGAGES—CODES CITED AND CONSTRUED.

CHATTEL MORTGAGES

Replevin. Equitable assignments.

Where notes secured by a chattel mortgage were indorsed, but the mortgage was not assigned, the notes, while carrying with them the equitable title to the mortgage, did not carry such title as would warrant the holder in maintaining replevin in his own name for the mortgaged chattels. *Type & Elec. Foundry v. Carter*, 489.

CODES CITED AND CONSTRUED

- §§ 227, 230 (S.). Statutes. Enactment. Veto by executive. Effect of "Adjournment." Return by governor. *Johnson City v. Electric Co.*, 632.
- § 1574 (S.). Railroads. Injuries to persons on track. Keeping "lookout ahead." *Railroad v. Wright*, 74.
- §§ 1697, 1703 (S.). Injunction. Right to remedy. Grounds. *Memphis St. Ry. Co. v. Rapid Transit Co.*, 99.
- § 1764 (S.). Constitutional law. Classification. Population. Turnpike road. *The State v. Turnpike Co.*, 446.
- § 1812 (1858). Eminent domain. Private road. Statutes. Constitutionality. *Bashor v. Bowman*, 269.
- §§ 1844-1859 (S.). Eminent domain. Compensation. Right to. *Western Union Tel. Co. v. Railroad*, 691.
- § 1866 (S.). Eminent domain. Remedies of property owners. Actions for damages. Necessity of jury of view. Res adjudicata. "Coram non judice." *Tenn. Power Co. v. Ley*, 511.
- § 2010 (1858). Husband and wife. Estates by the entirety. Statutory provisions. *Bennett v. Hutchens*, 65.
- §§ 2067, 2068, 3242 (S.). Banks and banking. Officers and agents. Liability to bank. Action. Pleading. Liability to bank at common law. *Green v. Officers & Directors of Trust Co.*, 609.
- §§ 2086, 2104 (S.). Action. Misjoinder of causes of action. Parties involved. *Ib.*
- §§ 2138-2144, ch. 6 (1857-58). Wills. Probate. Probate in common form. *State ex rel. v. Goodman*, 375.
- § 2203 (1858). Statutes. Revisions and compilations. Construction. *Sharp v. Railroad*, 1.
- § 2272 (S.). Insurance. Life companies. Right to erect building. *State Life Ins. Co. v. Dunbar*, 331.
- §§ 2291-2293. (1858). Death. Actions for wrongful death. Law governing. *Sharp v. Railroad*, 1.
- § 2419 (S.). Railroads. Farm crossings. Construction. Jurisdiction. Statutory provisions. *Shipp v. Belt Ry. Co.*, 238.

CODES CITED AND CONSTRUED.

CODES CITED AND CONSTRUED—Continued.

- § 3677 (S.). Husband and wife. Estates by the entirety. Statutory provisions. *Bennett v. Hutchens*, 65.
- § 3895 (S.). Wills. Requisites. Execution. Witnesses. *Long v. Mickler*, 51.
- § 3895 (S.). Wills. Validity. Personal property. *State ex rel. v. Goodman*, 375.
- § 3935 (S.). Executors and administrators. Jurisdiction to appoint. Existence of "assets." "Chattel." "Goods and Chattels." "Estate." "Goods, chattels, or assets or any estate, real or personal." "Chose in action." Statutory provisions. Statutes. Revisions and compilations. Constructions. *Sharp v. Railroad*, 1.
- § 4025 (S.). Death. Actions for cause of death. Nature. *Ib.*
- § 4027 (S.). Death. Actions for wrongful death. Law governing. *Ib.*
- § 4146 (S.). Wills. Provision for wife. Elections. Failure. Estoppel. *Battle v. Claiborne*, 286.
- §§ 4221-4223 (S.). Divorce. Alimony. Award in solido. Statute. *Winslow v. Winslow*, 663.
- § 4240 (S.). Equity. Practice. Special issues. *Minton v. Wilkerson*, 484.
- § 4246 (S.). Estoppel. Failure to assert title. Acts in derogation. Husband and wife. Separate estate. Conveyance to husband. *Battle v. Claiborne*, 286.
- § 4445 (S.). Abatement and revival. Pending action. Abandonment. What constitutes. *Walker v. Vandiver*, 423.
- § 4448 (S.). Limitation of actions. Disabilities. Nonresidence. removal of disabilities. Effect. Exceptions. *Jones v. Mining & Mfg. Co.*, 159.
- § 4570 (S.). Certiorari. Review. "Final judgment." *Burnett v. Layman*, 323.
- §§ 4611, 4612, 4616, 4673 (S.). Jury. Jury trial. Demand. *Life & Acc. Ins. Co. v. Jordan*, 495.
- § 4637 (S.). Certiorari. Scope of review. Petition. Assignments of error. Necessity. *McKay v. Railroad*, 590.
- §§ 4970, 4980 (S.). Ejectment. Actions. Pleadings. Sufficiency. *Jones v. Mining & Mfg. Co.*, 159.
- §§ 5131-5144, 5269 (S.). Attachment. Replevy bond. Judgment. *People's Nat. Bank v. Corse*, 720.
- § 5165 (S.). Insurance. Life companies. Power of insurance commissioner. *State Life Ins. Co. v. Dunbar*, 331.
- § 5997 (S.). Counties. Powers of county board. Regular sessions. *Walmsley v. Franklin Co.*, 579.

 COMPROMISE—CONSIDERATION.

CODES CITED AND CONSTRUED—Continued.

- §§ 6115, 6121, 6162 (S.). Judgment. Personal judgments. Character of notice. *Perry v. Young*, 522.
- § 6133 (S.). Equity. Cross-bill. Answer. *McDowell v. Hunt Contracting Co.*, 437.
- § 6470 (S. 1896). Husband and wife. Actions for torts. Statutory provisions. *Lilienkamp v. Rippetoe*, 57.
- § 7173 (S.). Criminal law. Pleas. Necessity of plea. *Sams v. State*, 188.

COMPROMISE

1. *Death. Widow's compromise after administrator's appointment. Effect.*

A widow whose husband had been killed in defendant's mine through the defendant's negligence had the right to compromise the claim after she had waived her right to administer and after the plaintiff had actually qualified as administrator of the decedent, as her superior right to control the claim by compromising it or by bringing suit thereon herself could not be impaired by his qualification, but continued until she in some manner waived it, and as her waiver of the right to administer was not tantamount to a waiver of her prior right to sue or to compromise. *Spitzer v. Iron Co.*, 217.

2. *Death. Compromise by widow. Attack.*

An attack upon the widow's compromise of an action against his employer for her husband's wrongful death on the ground of fraud practiced on her in procuring it could only be made by her, and could not be made by the administrator subsequently suing for the benefit of the widow and children. *Ib.*

CONFLICT OF LAWS

1. *Courts. Jurisdiction. Transitory actions. Actions for wrongful death.*

A right of action for wrongful death is transitory and may be enforced against the defendant wherever he may be found, provided it is not contrary to the policy of the forum and is allowed by the State wherein the injury occurred, except in those cases controlled by federal statutes. *Howard v. Railroad*, 19.

CONSIDERATION

See DEEDS; HUSBAND AND WIFE

CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW

1. *Construction.*

Under Const. U. S., Amend. 14, prohibiting the denial to any person of the equal protection of the law, and Const. Tenn., art. 1, sec. 8, prohibiting the imprisonment or execution of any person, or depriving him of life, liberty, or property, except by judgment of his peers or the law of the land, and article 11, sec. 8, forbidding class legislation, the same rules will be applied to classifications therein as to the classifications made in legislative enactments, so that the basis for a classification must be natural, and not arbitrary or capricious, and must rest on some substantial difference; but the classification is not invalid merely because it does not depend on scientific or marked differences. *City of Memphis v. State*, 83.

2. *Carriers. Class legislation. Regulation of jitneys. Private conveyances.*

Acts 1915, ch. 60, regulating jitneys as common carriers, and prohibiting their operation, except upon prescribed conditions, does not make an arbitrary classification between jitneys and privately owned automobiles, since the uses and character of operation of the two classes are distinct. *Ib.*

3. *Class legislation. Regulating jitneys. Street cars.*

Acts 1915, ch. 60, regulating jitneys as common carriers, and prohibiting their operation, except upon prescribed conditions, does not make an arbitrary classification between jitney busses and street railway cars, since the jitney runs upon no track, and is less substantial and more dangerous than the street car, thus presenting essential differences, properly the subject of classification. *Ib.*

4. *Class legislation. Regulation of jitneys. Taxicabs.*

Acts 1915, ch. 60, regulating jitneys as common carriers, and prohibiting their operation, except upon described conditions, does not make an arbitrary classification between jitneys and taxicabs, since taxicabs are for hire at a fare proportioned to the length of the trips of the several passengers, without regard to route, while the jitney carries passengers upon a designated route, and the investments in the two classes of machines are widely different. *Ib.*

5. *Class legislation. Arbitrary classification.*

Under the provisions of the constitution prohibiting class legislation, it is not sufficient to invalidate a statute merely to show points of similarity in the thing classified, and the

 CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—Continued.

thing excluded from the classification; it must be shown that the classification is unreasonable and impalpable. *City of Memphis v. State*, 83.

6. *Constitutional questions. Necessity of decision.*

The supreme court on appeal has jurisdiction and will determine the constitutionality of a law, although the cause may be decided upon other grounds, where the constitutional question is made in good faith and relied on in the case, since, Acts of 1907, ch. 82, establishing and defining the powers of the court of civil appeals, jurisdiction of that court is defeated by the presence of a constitutional question. *Memphis St. Ry. Co. v. Rapid Transit Co.*, 99.

7. *Statutes. Construction in favor of validity.*

A statute destroying the exceptions to the statute of limitations will be so construed that it may be held constitutional, if this can be done reasonably, in order to preserve the validity of the statute. *Jones v. Mining & Mfg. Co.*, 160.

8. *Limitation of actions. Obligation of contracts. Change of statute.*

The statute of limitations does not impair the obligation of contracts, but takes away the remedy only, and so may effect the remedy on contracts or rights made or acquired before, as well as those made after, its passage, provided that as to contracts made before its passage it must give the parties a reasonable time in which to sue. *Ib.*

9. *Eminent domain. Private road. Statutes. Constitutionality.*

Shannon's Code, sec. 1634, provides that: "When the lands of any person shall be surrounded or inclosed by the lands of any other person or persons who refuse to allow . . . such person a private road to pass to or from his . . . lands, it shall be the duty of the county court, on petition of such person . . . to appoint a jury of view, who shall, on oath, view the premises, and lay off and mark a road through the land of such person or persons . . . and report the same to the next court, which court shall have power to grant an order to said petitioner to open such road, not exceeding fifteen feet wide, and keep the same in repair." Section 1617, provides: "All roads and ferries that have been laid out or appointed, agreeably to law, or that shall be so laid out and appointed, are to be deemed public roads and ferries." *Held*, that section 1634 is not unconstitutional as taking private property for private use without just compensa-

CONSTITUTION CITED AND CONSTRUED.

CONSTITUTIONAL LAW—Continued.

tion, since the use declared by section 1617 is a public use. *Bashor v. Bowman*, 269.

10. *Classification. Population. Turnpike road.*

Acts 1905, ch. 534, as amended by acts 1907, ch. 242, requiring a turnpike company, whose charter permitted tolls to be charged, after the turnpike had been metaled as required by Shannon's Code, sec. 1764, to coat such metaling with a coat of sand, gravel or ground rock, restricted in its application to counties having a population of not more than 42,750, and not less than 42,700, according to the federal census, thus limiting it to turnpikes in one county, was a violation of Const. art. 11, sec. 8, declaring that no one shall be deprived of life, liberty, or property but by the law of the land, since while legislative acts made special by the use of the population standard for classification may be restricted to certain counties in their political capacity, it deprived the company of its property rights without affecting others in like condition elsewhere in the state, and since the duty imposed in such county upon a margin of fifty of population had no substantial and just relation to that county apart from other counties in which turnpike roads were operated. *State v. Turnpike Co.*, 446.

11. *Drains. Drainage district. Nature of.*

A drainage district is a governmental agency to which power to levy special assessments may be properly delegated. *In re Drainage Dist.*, 684.

CONSTITUTION CITED AND CONSTRUED

§ 4, art. 10. Counties. Partition. Constitution. Statutes. *Giles Co. v. Marshall Co.*, 414.

§ 8, art. 1, 11. Constitutional law. Construction. *City of Memphis v. State*, 83.

§ 8, art. 11. Constitutional law. Classification. Population. Turnpike road. Statutes. "General law." "Special law." Constitutionality. *State v. Turnpike Co.*, 446.

§ 11, art. 2. Statutes. Enactment. Return by governor. "Adjournment." *Johnson City v. Electric Co.*, 632.

§ 14, art. 1. Infants. Delinquent children. Statutes. Validity. *Childress v. State*, 121.

§ 17, art. 2. Statutes. Titles. Plurality of subjects. Validity. *Walmsley v. Franklin Co.*, 579.

 CONTRACTS.

CONSTITUTION CITED AND CONSTRUED—Continued.

- § 17, art. 2. Husband and wife. Actions for torts. Statutory provisions. *Lillienkamp v. Rippetoe*, 57.
- § 18, art. 3. Statutes. Enactment. Veto by executive. Effect of "Adjournment." Return by governor. *Johnson City v. Electric Co.*, 632.
- § 23, art. 1. Torts. Resort to legal proceedings. Petition to revoke. Merchant's license. *McKee v. Hughes*, 455.
- § 28, art. 2. Taxation. Exemptions. Municipal corporations. Property. "Public purpose." Used for public purpose. *Johnson City v. Weeks*, 277.
- § 29, art. 2. Drains. Drainage districts. County courts. *In re Drainage Districts*, 684.

CONTRACTS

1. *Sales. Breach of contract. Remedy of buyer. Rescission.*
Where plaintiff, selling goods to defendant, represented that defendant was to handle the goods exclusively in his city, without which inducement the contract would not have been made, defendant's subsequent sale of the same goods to another dealer in that city was a breach of a material part of the contract, so that, regardless of whether there was fraud, the buyer was entitled to rescind. *Monogram Mfrs. v. Johnson*, 571.
2. *Sales. Breach of contract. Remedy of buyer. Verdict. Sufficiency.*
In such action, where the verdict for defendant on the ground of his right to rescind was correct, whether the jury attributed that right to the ground of fraud or to the defense that there was a breach of a material part of the engagement was immaterial. *Ib.*
3. *Construction. Intention of parties.*
The object in the construction of contracts is to ascertain the intention of the parties and what the contract means as a whole. *McKay v. Railroad*, 590.
4. *Construction. Relation of parties.*
In the construction of contracts, courts will look to the nature of the subject-matter, the relation of the parties to the contract, and the object to be accomplished. *Ib.*
5. *Carriers. Limiting liability. Express company's employees. Contracts of employment.*
A contract, whereby plaintiff, then employed as a messenger by an express company, entered into a contract with the ex-

CORPORATIONS.

CONTRACTS—Continued.

press company containing the words "have entered or am about to enter," for a continued future employment, agreeing to the express company's contract to save defendant railroad harmless from all liability to the company's employees for any injury on defendant's line, whether caused by negligence of defendant or otherwise, and ratifying its contracts with carriers when accepted by the express company, initiated a new term of employment, so as to constitute a good consideration for the plaintiff's contract. *Ib.*

6. *Carriers. Contract limiting liability. Reading contract. Effect.*

In such case, plaintiff, in the absence of any fraud practiced upon him by the express company in procuring the contract, was bound thereby, whether he did or did not read the contract when he signed it. *Ib.*

8. *Public policy. Release of right to recover for personal injury.*

Such contract, in respect to plaintiff's surrender of his right of action against the carrier for personal injury in consideration of his employment by the express company, was not void as against public policy. *Ib.*

7. *Public policy. Release of right to recover for personal injury.*

A bank which furnishes money to a federal contractor to pay for materials or labor, does not come within a bond guaranteeing performance of the contract, and conditioned that the contractor shall promptly make payment to all persons supplying labor or material. *People's Nat. Bank v. Corse*, 720.

CORPORATIONS

1. *Foreign corporations. "Doing business." "Factor." "Commission merchant."*

A foreign corporation, which consigned tires for sale to a company handling automobile accessories in the State, was not "doing business" within the State to render necessary compliance with the foreign corporation act as a condition precedent to its right to recover of the sureties on the bond of the consignee, since the business of a "factor" or "commission merchant," synonymous terms, meaning one whose business is to receive and sell goods for commission, is not the conduct of an agency or business for the consignor of the goods sold where the factor picks customers at his own risk and the signor does not exclusively own the proceeds. *Cooper Rubber Co. v. Johnson*, 562.

COUNTIES.

CORPORATIONS—Continued.

2. *Foreign corporations. Doing business.*

The requirement of a contract between a foreign rubber company and a local company selling tires for the rubber company on commission that the local company should keep the goods insured in the name of the rubber company did not constitute the local company a business agency of the rubber company so to render the latter subject to laws relating to doing business in the State. *Cooper Rubber Co. v. Johnson*, 562.

3. *Foreign corporations.. "Doing business."*

The provision of the contract for the sale on commission of automobile tires consigned to an automobile accessories company in the State by a foreign rubber company that the former should make adjustments necessary under the selling guaranty out of the latter's stock in its hands did not render the rubber company subject to laws relating to engaging in business within the State. *Ib.*

COUNTIES

1. *Partition. Constitution.*

The provision of the Const. art. 10 sec. 4, that where a new county is established by carving territory from old territories, no part of an existing county shall be taken to form a new county without the consent of two-thirds of the qualified voters in such part taken, does not apply, where a portion of one county is, by the legislature, removed and added to an already existing county. *Giles County v. Marshall County*, 414.

2. *Partition. Statutes.*

Const. art. 10, sec. 4, providing for removing of territory from existing counties, and formation of new counties, and declaring that no line of such county shall approach the courthouse of any old county from which it may be taken nearer than eleven miles, applies where a strip of land is removed from one county and added to another; and Priv. Acts 1915, ch. 384, carving a strip from Giles county and adding it to Marshall county, is invalid, as the line of Marshall county as advanced is nearer than eleven miles of the courthouse of Giles county. *Ib.*

3. *Taxes. Property liable.*

It is within the power of a county to tax and assess all property within the county, both within and without corporate limits of municipalities, for the purpose of improving and

CRIMINAL LAW.

COUNTIES—Continued.

constructing pikes, whether the money so obtained is expended within or without municipalities; the general laws for dirt road construction not being applicable. *Raulston v. Marion Co.*, 433.

4. *Powers of county board. Regular sessions.*

Under Pub. Acts 1913, ch. 26, sec. 1, providing for the improvement of county roads, and Pub. Acts 1915, ch. 23, the 1913 act requiring the issuance of bonds by the county courts in quarterly session assembled, the county courts may issue bonds at a specially called meeting under Shannon's Code, sec. 5997, providing that the chairman or judge of the county court shall have power to convene the quarterly courts in special session. *Walmsley v. Franklin Co.*, 579.

5. *Highway bonds. Time of redemption.*

Under Pub. Acts 1913, ch. 26, sec. 1, providing that highway bonds shall mature at such time as determined by the county court, not exceeding forty years from the date of issuance, redeemable at the option of the county at such times as fixed by the court, a resolution of the county court fixing the time and maturity of the bonds in forty years, was valid, since it fixes a definite date of maturity. *Ib.*

6. *Highway bonds. Notice. Statutory requirements.*

The provision of Pub. Acts 1913, ch. 26, sec. 2, requiring that the orders and resolutions of the county courts directing issuance of highway bonds shall be preceded by at least thirty days by the adoption of a resolution setting forth the roads to be built or improved, and published as a notice to the voters, is mandatory, and compliance may be enforced before the adoption and issuance of the bonds, but, where no objection is made until after the issuance of the bonds, the bonds are not invalid for failure to comply therewith. *Ib.*

CRIMINAL LAW.

1. *Fish. Preservation. Statutes. Implied repeal.*

Acts 1897, ch. 57, made it unlawful to explode dynamite in any stream, lake, or pond, and made any violation a felony. Acts 1907, ch. 489, made it unlawful to kill or wound by the use of dynamite any fish in any stream, lake, river, or pond, and made any violation a misdemeanor. Defendant was convicted under a presentment under the 1897 statute. *Held*, that the 1897 act was impliedly repealed by that of 1907, so that no conviction under it could be sustained. *Bivens v. State*, 40.

DAMAGES—DEEDS.

CRIMINAL LAW—Continued.

2. *Pleas. Necessity of plea.*

Where the record failed to show that a plea of not guilty was interposed, and there was nothing in the transcript from which an implication might arise that such a plea was filed, a verdict and judgment were nullities as there was no issue for the jury to try. *Sams v. State*, 188.

3. *Intent. Insanity.*

Where defendant forged indorsements to a note, having sense enough to know that his act was a violation of law, he was punishable, though believing that Providence would intervene to prevent his detection and punishment, yet one so deficient in mind that he has no sense of right or wrong, nor capacity to reason about the quality of his act and no consciousness of wrongdoing, is not guilty of crime in committing a criminal act, since he has no criminal intent. *Watson v. State*, 198.

4. *Forgery. Sufficiency of evidence.*

In a prosecution for forging indorsements, evidence held sufficient to sustain verdict of guilty. *Ib.*

DAMAGES

Eminent domain. Proceedings. Compensation.

As a telegraph company may acquire the right to construct its line on a railroad right of way where it does not obstruct the operation of the railroad, but there may be an interference not amounting to an obstruction, the railroad company cannot be denied substantial damages, particularly where the taking will force it, in case it builds its own telegraph line, to adopt a less advantageous route, this being so though the telegraph company offered to remove its line in case it should be an obstruction, for a slight interference would not amount to an obstruction. *Western Union Tel Co. v. Railroad*, 691.

DEEDS

1. *Husband and wife. Estates by the entirety. Construction.*

Where a deed of land is to a husband and wife, it is immaterial that it does not show upon its face that they are husband and wife, or that it was the intention of the grantor to create an estate by the entirety, but the common-law requires that the estate be by the entirety. *Bennett v. Hutchens*, 65.

DEFENSES.

DEEDS—Continued.

2. *Adverse possession. Color of title. Sufficiency.*

The deeds relied upon by the defendants as color of title to property in question in ejectment were sufficient to show color of title, since when considered with prior grants they purported to convey a fee, though in fact, the deeds in question were but quitclaim deeds. *Jones v. Mining & Mfg. Co.*, 159.

3. *Estoppel. Formal sufficiency. Consideration. Recital. When binding.*

Where a deed is sufficient in form to pass title to the grantee, and purports to have been made for a valuable consideration, the grantor and his heirs at law are estopped thereby to show that a valuable consideration was not paid by the grantee, where there is no fraud on grantee's part, and the rights of innocent purchasers or creditors of the grantor have not intervened. *Battle v. Claiborne*, 286.

4. *Formal sufficiency. Recital of consideration. Want of consideration. Title.*

Even though such a deed is admittedly without consideration, it passes title to the grantee. *Ib.*

5. *Husband and wife. Deed to wife. Delivery to husband. Recording by husband. Knowledge of wife. Delivery and acceptance.*

The execution and delivery by C. to the grantor of the deed to the wife and its delivery by the grantor to the register for record with knowledge that it was afterwards recorded and an assent to and claim under the deed by the wife with knowledge that it had been so made and recorded, was sufficient evidence to warrant the conclusion that there was a delivery to and acceptance by the wife. *Ib.*

See HUSBAND AND WIFE

DEFENSES

Bills and notes. Defenses available against innocent holders.

Under Negotiable Instruments Law (Acts 1899, ch. 94) sec. 60, providing that the maker of a negotiable instrument, by making it, engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse, the innocent holder of a negotiable note may recover thereon, though the payee was a foreign corporation, which, though required to do so, had not complied with the

DAMAGES—DEEDS.

CRIMINAL LAW—Continued.

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DEFENSES.

DEEDS—Continued.

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DESCENT AND DISTRIBUTION—DIVORCE.

DEFENSES—Continued.

law in respect to filing a copy of its charter of incorporation.
Edwards v. Fruit Products Co., 142.

DESCENT AND DISTRIBUTION

Wife's personality. Husband's rights. Statutes.

Laws 1913, ch. 26, entitled "To Remove Disabilities of Cover-
ture from Married Women," and providing that they are
fully emancipated from all such disabilities, and that the
common-law with respect thereto and its effect, on the rights
of the wife is totally abrogated, that marriage shall not im-
pose any disability on a woman as to the ownership, acquisi-
tion, or disposition of property, and that she shall have
the same capacity to acquire, hold, manage, control, use, en-
joy, and dispose of property as if unmarried, failing expressly,
or by necessary implication, to make any disposition of her
property after her death, in the event of her failure to dis-
pose of it, her personal property on her death, without such
disposition, passes, *jure mariti*, to her husband, as it would
had they, prior to passage of the act, made an antenuptial
contract in the terms of the statute, under the law then
existing. *Baker v. Dew*, 126.

DIVORCE

1. *Alimony. Award in solido. Statute.*

Under Shannon's Code, section 4222, providing that the court
may decree to the wife such part of the husband's real and
personal estate as it may think proper, where an absolute
divorce was awarded a wife for abandonment against her
husband, worth some \$170,000, the husband having been the
more to blame in their difficulties, an award to the wife of
\$200 a month alimony cannot stand, and she will be decreed
\$50,000 *in solido*. *Winslow v. Winslow*, 663.

2. *Allowances. Attorneys' fee.*

Attorneys for the wife in her successful suit for absolute di-
vorce against her husband were entitled to a fee of \$5,000
from the husband though they could have procured a divorce
upon the ground of abandonment alone with very little trou-
ble, but in fact charged cruel and inhuman treatment and
infidelity as well. *Ib.*

3. *Allowances. Attorneys' fee.*

Attorneys' fees are treated as part of the expenses incident to
a divorce case, and are generally allowed the wife, whether

DRAINAGE DISTRICT—ELECTIONS.

DIVORCE—Continued.

complainant or defendant, both upon the successful termination of her suit for divorce, as well as for services *pendente lite*. *Ib.*

DRAINAGE DISTRICT

Drains. County courts.

Laws 1909, chapter 185, as amended by Laws 1915, chapter 61, provides that, where lands included in a drainage district shall lie in several counties, the county court of any one of the counties has jurisdiction to create and establish such district without the necessity of resorting to the county courts of other counties for concurrent or ancillary action. Constitution article 2, section 29, declares that the General Assembly shall have power to authorize the several counties and incorporated towns to impose taxes for county and corporation purposes. *Held*, that the constitutional provision applies only to taxes, and not to special assessments; hence the legislature could validly give the county court jurisdiction over proceedings to establish a drainage district lying in several counties, since in the absence of restriction, the legislature's power is plenary, and drainage districts, being governmental agencies, need not coincide with county lines. *In re Drainage District*, 684.

EJECTMENT

Actions. Pleadings. Sufficiency.

Pleadings in ejectment were sufficient, where title was averred upon one hand and denied upon the other, regardless of failure to plead details. *Jones v. Mining & Mfg. Co.*, 159.

ELECTIONS

1. *Wills. Provisions for surviving wife. Operation and effect of election.*

Where a widow, given a life estate in real property by the will of her husband, dissented from the will, the estates in remainder were thereby accelerated so that the remaindermen became entitled to the immediate possession and beneficial use of such of the property devised to the widow for life and to them in remainder, as was not assigned to the widow as dower; the legal effect of the dissent as regarded the widow's life estate being the same as if she had died. *Meck v. Trotter*, 145.

ELECTIONS.

ELECTIONS—Continued.

2. Wills. Provisions for surviving wife. Operation and effect of election.

A testator gave a life estate in certain real estate to his wife, and provided that after her death certain parts of such real estate should go to his daughters D. and F., a granddaughter and a grandson; it being further provided that upon the death of the granddaughter, or the daughter F. without issue, the property given them should vest in the daughter D. and her bodily heirs. After certain money legacies, the will gave all other moneys, notes, bonds, and chattels to the children of D. The widow dissented from the will and her dower was laid off in amounts not proportioned to the several estates in remainder, a larger part of the property given to F. being taken than of the property given to the other remaindermen, while the child's portion and the year's support allotted to the widow were taken out of property that would otherwise have passed under the legacy to the children of D. *Held*, that F. was entitled to contribution from the other remaindermen to equalize the inequality due to the assignment to the widow of a disproportionate part of the real estate devised to her in remainder. *Meck v. Trotter*, 145.

3. Wills. Provisions for surviving wife. Operation and effect of election.

D.'s children, even assuming that the legacy to them was a residuary legacy, were entitled to have the realty turned back by the widow's renunciation sequestered during the life of the widow for their indemnity, as assuming that residuary legatees are not entitled to such relief, unless the will shows that they were preferred objects of the testator's bounty, the gifts over after the death of F. and the granddaughter without issue, showed that they were the peculiarly preferred objects of the testator's bounty. *Ib.*

4. Wills. Provisions for surviving wife. Operation and effect of election.

The payments to F. by the other remaindermen should be continued only during the widow's life, and not throughout F.'s life. *Ib.*

See ESTOPPEL

EMINENT DOMAIN.

EMINENT DOMAIN

1. *Private road. Statutes. Constitutionality.*

Shannon's Code, sec. 1634, provides that: "When the lands of any person shall be surrounded or inclosed by the lands of any other person or persons who refuse to allow . . . such person a private road to pass to or from his . . . lands, it shall be the duty of the county court, on petition of such person . . . to appoint a jury of view, who shall, on oath, view the premises, and lay off and mark a road through the land of such person or persons, . . . and report the same to the next court, which court shall have power to grant an order to said petitioner to open such road, not exceeding fifteen feet wide, and keep the same in repair." Section 1617, provides: "All roads and ferries that have been laid out or appointed, agreeably to law, or that shall be so laid out and appointed, are to be deemed public road and ferries." *Held*, that section 1634 is not unconstitutional as taking private property for private use without just compensation, since the use declared by section 1617 is a public use. *Bashor v. Bowman*, 269.

2. *Roads. Character of way.*

That a highway declared to be public by statute is used chiefly by a private individual does not make it a private highway, where the whole public has the right to use it. *Ib.*

3. *Roads. Character. Cost of maintenance.*

That a highway declared by statute to be public is opened and maintained at private expense does not detract from its public character, nor does the fact that the statute, authorizing the creation of the road as a highway, refer to it as a public road. *Ib.*

4. *Remedies of property owners. Actions for damages. Necessity of jury of view. Res adjudicata. "Coram non judice."*

In an action for damages for the taking of land for a power company's lines, wherein the amount of land taken was agreed upon, and the sole issue was its value, where compensatory and incidental damages were assessed by the trial jury, which laid off by metes and bounds the land taken, the proceeding was not *coram non judice*, since the court had jurisdiction of the controversy, although there was no issue as to the land taken, but the judgment was a valid adjudication on the question of damages, although no jury of view was had, since Shannon's Code, section 1866, provides that the injured party may sue for damages in the ordinary way, in which case

ESTOPPEL

EMINENT DOMAIN—Continued.

the jury shall lay off the land by metes and bounds, and assess the damages as upon the trial of an appeal from the return of a jury of inquest. *Tenn. Power Co. v. Lay*, 511.

5. *Right to damages. Separate titles.*

Where a wife owned a tract of land, and, together with her husband as tenant by the entirety, owned a tract across a public turnpike which was used with individually owned tract, she could not, upon condemnation by a railroad of a right of way through the tract owned by her and her husband by the entirety, recover damages to the tract individually owned by her. *Tillman v. Railroad*, 554.

6. *Telegraph and railway companies. Right to condemn.*

As Act Cong. July 24, 1866, chapter 230, section 1, 14 Stat. 221 (Rev. St. U. S. sec. 5263 [U. S. Comp. St. sec. 10072]), does not confer upon telegraph companies the right to condemn an easement over a railroad right of way, but merely denies the State power to prevent an occupation and use of such right of way for telegraph purposes, a telegraph company may, under the State laws, condemn for telegraph purposes a way over a railroad right of way. *Western Union Tel. Co. v. Railroad*, 691.

7. *Compensation. Right to.*

As a telegraph company, upon condemning the right to erect a telegraph line on a railroad right of way is obligated to prevent its line from obstructing the use of the right of way for railroad purposes, Shannon's Code, secs. 1844-1859, providing for compensation in money, makes adequate provision for assessment of damages and allowance of compensation. *Ib.*

8. *Proceedings. Selection of line.*

Where a telegraph company condemns the right to build a line on a railroad right of way, the telegraph company, and not the railroad company, is entitled to select the site for the telegraph line, so long as it does not interfere with the operation of the railroad. *Ib.*

ESTOPPEL

1. *Railroads. Crossings. Rights of owner.*

An owner of land on both sides of a railroad track, who conveyed an additional strip for a right of way for switch tracks, cannot, after having had the land reconveyed to him, compel

ESTOPPEL.

ESTOPPEL—Continued.

the railroad company to construct a crossing where no provision therefor was made in the conveyance. *Shipp v. Belt Ry. Co.*, 238.

2. *Deeds. Formal sufficiency. Consideration. Recital. When binding.*

Where a deed is sufficient in form to pass title to the grantee, and purports to have been made for a valuable consideration, the grantor and his heirs at law are estopped thereby to show that a valuable consideration was not paid by the grantee, where there is no fraud on grantee's part, and the rights of innocent purchasers or creditors of the grantor have not intervened. *Battle v. Claiborne*, 286.

3. *Failure to assert title. Acts in derogation. Estoppel.*

In an action by heirs of a grantor who conveyed land in fee to C., who in turn conveyed it to grantor's wife separately, seeking cancellation of the deeds as a cloud on their title, on the ground that such deed by the grantor to C. was a mortgage which had been subsequently paid, as recited in a deed from C. to the grantor, made subsequent to the conveyance by C. to the wife, the facts that the wife did not claim the land, but spoke of it as the husband's, that she had urged him to will it to her with power of final disposition, and, failing this, induced him to devise her a life estate therein, with remainder over to his kin, did not estop her or those claiming under her from asserting title, where she was justified under the whole transaction and representations made to her in believing that title was in the husband. *Ib.*

4. *Wills. Provision for wife. Election. Failure.*

Where a widow failed within a year to dissent from her husband's will as provided for by Shannon's Code, sec. 4146, the provision of the will for her being a life estate in land owned by her through a conveyance in fee from the husband to C. and a conveyance by C. to her, she having been led by her husband to believe, as did he, that the title was subsequently revested in him by certain deeds of the same property made by C. to him, reciting that the original deed to C. was a mortgage which had been fully paid, the widow's next of kin and heirs at law were not concluded by the failure on the widow's part to so dissent and her acceptance of the provision of the will in derogation of her title, since the statute, being designed to secure to the wife a proper provision from her husband's property by an election made within a time limited in the inter-

EVIDENCE.

ESTOPPEL—Continued.

ests of the speedy administration of estates, does not apply under such facts. *Battle v. Olaiborne*, 286.

5 *Predecessors in title. Warranty. When not binding.*

Where a grantor conveyed property to C. in fee, and C. conveyed it to the grantor's wife, the wife's representatives were not estopped to assert the title thus vested in her because of any estoppel which might have arisen against C. by reason of the special warranty in a subsequent deed to the property given by C. to the grantor that "the said C. hereby warrants the title to said land against the lawful claims of all persons claiming by, through, or under him, . . . " or by reason of a recital in such deed that the original deed from grantor to C. was a mortgage which has been fully paid where the special warranty deed was procured by the husband in an effort to becloud the title vested in the wife by the original transactions, which was also had through his procurement. *Ib.*

EVIDENCE

1. *Bastards. Presumption of legitimacy.*

The presumption of the legitimacy of a child born during wedlock is indulged, though antenuptial conception is made to appear. *Jackson v. Thornton*, 36.

2. *Bastards. Presumption of legitimacy.*

The presumption of the legitimacy of a child born during wedlock is weakened and may be overcome by a less weight of evidence where antenuptial conception is shown. *Ib.*

3. *Bastards. Presumption of legitimacy.*

Though antenuptial conception is shown, clear, strong, and convincing testimony must be adduced to overcome the presumption of the legitimacy of a child born in wedlock, and a mere preponderance is not enough, nor may testimony of mere rumor and suspicion among neighbors touching the paternity of the child overcome the presumption. *Ib.*

4. *Limitation of actions. Exceptions. Burden of proof.*

While the burden of proof is on the party asserting the bar of the statute of limitations to show that his opponent is barred, when such showing is made, then the burden shifts to the other party to show that he has been at all times within an exception of the statute. *Jones v. Mining & Mfg. Co.*, 159.

EVIDENCE.

EVIDENCE—Continued.

5. *Adverse possession. Requisites. Burden of proof.*

One seeking to show title by adverse possession has the burden to make out by clear and positive testimony such adverse possession as will bar the real title. *Jones v. Mining & Mfg. Co.*, 183.

6. *Adverse possession. Requisites. Burden of proof.*

Although instruments under which an adverse claimant made his claim did not appear, but it was established that there was such a claim, another claimant, seeking in an action to establish title by adverse possession, has the burden of clearing up the questions raised by the existence of the other claim, and of showing its invalidity. *Ib.*

7. *Adverse possession. Requisites. Burden of proof.*

In spite of the principle that a tenant cannot attorn to another, so as to hold adversely to his landlord without notice to him, where it appeared that a tenant had claimed adversely to his landlord because of certain suits involving the landlord's title, one seeking to establish adverse possession to the same land, as against both the landlord and the tenant and their assignees, has the burden of showing positively that the tenant had no title by adverse possession. *Ib.*

8. *Criminal law. Opinion. Insanity.*

In a criminal case, a hypothetical question intended to elicit opinion evidence as to defendant's sanity, is incompetent, unless addressed to an expert on insanity. *Watson v. State*, 198.

9. *Criminal law. Opinion. Insanity. Form of question.*

In a prosecution for forgery, where a medical witness was asked the question, "Taking into consideration what you know of defendant's ancestors and his family, and what you know of him personally, and then taking into further consideration the further fact, if it be a fact (stating certain facts assumed to have been shown by the evidence), state whether or not, in your judgment, defendant had a sound mind," such question was improper, and the answer thereto properly excluded, since it called for the witness' opinion, based not only on the facts stated, but also on what the witness knew of the defendant personally; his family and ancestors. *Ib.*

10. *Reformation of instruments. Requisite.*

A court of equity will not exercise its powers of reforming a written instrument except upon clear, certain, and satisfactory

EVIDENCE.

EVIDENCE—Continued.

evidence placing the propriety of reformation beyond reasonable controversy. *Battle v. Claiborne*, 286.

11. *Mortgages. Deeds. Sufficiency.*

Where complainants, claiming through their father, sought the cancellation of a deed from him to C. and of a deed from C. to grantor's wife separately, as a cloud upon their title on the ground that the first deed was a mortgage which had been shown in the recitals of two subsequent deeds to the land fully paid after the execution of the deed to the wife by C. as executed and delivered by C. to the grantor, evidence held insufficient to support a decree for cancellation. *Ib.*

12. *Criminal law. Expert testimony.*

In a prosecution for assault with intent to commit murder in the first degree, a medical expert, while qualified to testify as to the range of the bullet, is not qualified to testify that the prosecuting witness, who was found with the revolver in her hand, could not have inflicted the shot herself, for that was the ultimate question for the jury, and any person reasonably familiar with firearms could draw as accurate a conclusion as the medical expert. *McCravy v. State*, 358.

13. *Conspiracy. Merchant's license. Petition to revoke. Malice. Presumption..*

In addressing such a petition to the municipal authorities, the petitioners are presumed to act without malice; the burden being on the party complaining to show the contrary. *McKee v. Hughes*, 455.

14. *Presumption. Knowledge of law.*

The presumption of knowledge of the law cannot be made the basis of imputed bad faith on defendant's part in presenting such petition to the board for the abatement of a condition not a nuisance *per se* which could be legally abated only by judicial proceedings. *Ib.*

15. *Judicial notice. Banking custom.*

The court will judicially know that in Tennessee the duty to make loans does not ordinarily devolve on the directors of a bank. *Green v. Officers & Directors of Trust Co.*, 609.

16. *Licenses. Nonpayment of occupation tax.*

One suing on a contract made in pursuance of a business defined by statute as a privilege cannot be defeated by failure to pay his privilege tax, in the absence of some proof in the record showing his default. *Morton v. Imperial Realty Co.*, 681.

EXEMPTIONS—EXECUTORS AND ADMINISTRATORS.

EXEMPTIONS

See TAXES AND TAXATION

EXECUTORS AND ADMINISTRATORS

1. *Jurisdiction to appoint. Existence of "assets." "Chattels," "Goods and chattels." "Estate." "Goods, chattels, or assets or any estate, real or personal." "Chose in action."*

Under Shannon's Code, sec. 3935, providing that letters of administration may be granted upon the estate of a nonresident by the county court of any county where deceased had any goods, chattels, or assets or any estate, real or personal, at time of his death, or where the same may be when the letters • are applied for, or where any suit is to be brought, prosecuted, or defended in which the estate is interested, an administrator may be appointed in the county in which the decedent was wrongfully killed, though the cause of action for the wrongful death is the only asset in the county, and there are no technical assets. Since the word "chattels" includes not only personal property in possession, but choses in action, the term "goods and chattels" is of very wide signification, and includes choses in action. The term "choses in action" includes rights of action for tort. The word "assets," as used in the administration statutes, though usually meaning items subject to payment of the debts of the decedent, is not wholly limited to this meaning, but has been applied to money collected by an administrator as damages for the wrongful killing of an intestate. The word "estate," though in its primary and technical sense referring only to an interest in land, as used with reference to a decedent's property, has acquired a wider application in a popular sense and refers to the entire mass of decedent's property, both real and personal, while the words "goods, chattels, or assets or any estate, real or personal," include every kind of property of any nature whatsoever, and are not limited to technical assets subject to the payment of debts. *Sharp v. Railroad*, 1.

2. *Jurisdiction to appoint. Existence of assets.*

An administrator may be appointed to bring an action for wrongful death wherever the defendant may be found, though the decedent was a nonresident and left no assets in the State other than such right of action, and though he sustained the injuries causing his death in another State, as the right of action itself is property and is transitory, and exists wherever the defendant may be found. *Howard v. Railroad*, 19.

EXPERT TESTIMONY—HUSBAND AND WIFE.

EXPERT TESTIMONY

See EVIDENCE; WITNESSES

FEDERAL EMPLOYER'S LIABILITY ACT

See LIABILITY

FRANCHISE

Injunction. Right to invoke. Exclusive.

Where the plaintiff street railway company has a franchise from the city, its franchise is a property right, under which it can restrain any person from becoming a common carrier of passengers in competition with it without legislative or municipal authority, and for that purpose its franchise is exclusive against all persons upon whom similar rights have not been conferred. *Memphis St. Ry. Co. v. Rapid Transit Co.*, 99.

See INJUNCTION

FRAUDULENT CONVEYANCES

See SALES; HUSBAND AND WIFE

HOMESTEAD

Exception from exemption. Constructive trusts. Misappropriation of property.

A person who, by reason of the misappropriation of another's property, and investment thereof in real estate, was a trustee *ex maleficio* for the person whose property was appropriated, was not entitled to a homestead in such real estate as against the *cestui que trust*. *Preston v. Moore*, 247.

HOMICIDE

Offenses. Evidence. Sufficiency.

In a prosecution for assault with intent to commit murder in the first degree, evidence held insufficient to warrant conviction. *McCravy v. State*, 358.

HUSBAND AND WIFE

1. *Actions for torts. Statutory provisions.*

Neither Shannon's Code, sec. 6470, making one committing an assault and battery upon his wife for any cause whatsoever guilty of a misdemeanor, nor Pub. Acts 1913, ch. 26, providing

HUSBAND AND WIFE.

HUSBAND AND WIFE—Continued.

that married women are thereby fully emancipated from all disability on account of coverture, that marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married, but that every married woman shall have the same capacity to acquire, hold, control, and dispose of property and to make any contract in reference thereto and to bind herself personally, and to sue and be sued as if she were not married, abrogates the common-law rule that one spouse cannot sue the other for a tort committed during the marriage, as it must be assumed that, if it had been the purpose of the legislature to change this rule, such purpose would have been clearly expressed, or would have appeared by necessary implication. *Lillenkamp v. Rippetoe*, 57.

2. *After acquired property. Estates by the entirety.*

Where a deed of land is to a husband and wife, an estate therein is by the entirety, and not in common, so that, on the death of one, the other takes the land absolutely. *Bennett v. Hutchens*, 65.

3. *Estates by the entirety. Deed. Construction.*

Where a deed of land is to a husband and wife, it is immaterial that it does not show upon its face that they are husband and wife, or that it was the intention of the grantor to create an estate by the entirety, but the common-law requires that the estate be by the entirety. *Ib.*

4. *Descent and distribution. Wife's personality. Husband's rights. Statutes.*

Laws 1913, ch. 26, entitled "To Remove Disabilities of Coverture from Married Women," and providing that they are fully emancipated from all such disabilities, and that the common-law with respect thereto and its effect, on the rights of the wife is totally abrogated, that marriage shall not impose any disability on a woman as to the ownership, acquisition, or disposition of property, and that she shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of property as if unmarried, failing expressly, or by necessary implication, to make any disposition of her property after her death, in the event of her failure to dispose of it, her personal property on her death, without such disposition, passes, *jure mariti*, to her husband, as it would had they,

HUSBAND AND WIFE.

HUSBAND AND WIFE—Continued.

prior to the passage of the act, made an antenuptial contract in the terms of the statute, under the law then existing. *Baker v. Dew*, 126.

5. *Conveyance to wife. Formal sufficiency. Recital of consideration. Title.*

Where one conveyed land in fee to C., who in turn conveyed it to grantor's wife, by a deed containing apt words for the creation of a separate estate, such estate was vested in the wife unincumbered by any rights of the husband, though, as a matter of fact, there was no payment of the valuable consideration recited in each deed. *Battle v. Claiborne*, 286.

6. *Deed to wife. Delivery to husband. Recording by husband. Knowledge of wife. Delivery and acceptance.*

The execution and delivery by C. to the grantor of the deed to the wife and its delivery by the grantor to the register for record with knowledge that it was afterwards recorded and an assent to and claim under the deed by the wife with knowledge that it had been so made and recorded, was sufficient evidence to warrant the conclusion that there was a delivery to and acceptance by the wife. *Ib.*

7. *Separate estate. Conveyance to husband.*

Under Shannon's Code, sec. 4246, empowering married women to dispose of their separate estate, a married woman can pass title to her husband. *Ib.*

8. *Joint possession with wife. Effect.*

Where a husband conveyed land in fee to C., and C. conveyed to the grantor's wife, thereby vesting title in her, a claim of title by the husband to the land under subsequent deeds from C. to him could not ripen into title by adverse possession as against the wife, where the land was timber land, and such possession as was had was jointly with the wife, and not adverse as to either. *Ib.*

9. *Obligations. Survivorship.*

Where an obligation is in favor of a husband and wife such joint security or chose in action survives to the wife as against the personal representative of the husband, though the consideration therefor passed from the husband. *Smith v. Haire*, 343.

10. *Wife's choses in action. Reduction to possession.*

That a husband who had a certificate of deposit made payable to himself and wife retained it in his possession does not show

INFANTS.

HUSBAND AND WIFE—Continued.

a reduction to possession destroying the wife's right of survivorship. *Ib.*

11. *Wife's chose in action. Reduction of possession.*

Where a husband who had a certificate of deposit made payable to himself and wife made a will carrying with it disposition of such certificate, the execution of the will, which instrument was ambulatory and did not speak until the husband's death, did not amount to a reduction of the chose in action to possession, destroying the wife's right of survivorship. *Ib.*

12. *Fraudulent conveyances. Consideration.*

The undertaking by a wife to personally care for her husband's mother is consideration for his conveyance to her, attacked as fraudulent, of property which had been conveyed to him in consideration that he would care for his mother. *Gilbert v. Ashby*, 370.

13. *Eminent domain. Right to damages. Separate titles.*

Where a wife owned a tract of land, and, together with her husband as tenant by the entirety, owned a tract across a public turnpike which was used with individually owned tract, she could not, upon condemnation by a railroad of a right of way through the tract owned by her and her husband by the entirety, recover damages to the tract individually owned by her. *Tillman v. Railroad*, 554.

See ACTS CITED AND CONSTRUED

INFANTS

Crimes. Criminal procedure. "Delinquent child."

Where the evidence showed without dispute that defendant was under sixteen at the time of his arrest and at the time of the court's action on a motion in arrest of judgment, it should have sustained the motion and transferred the cause and the custody of defendant to the juvenile court under Acts 1911, ch. 58, defining a "delinquent child" as any child under sixteen who violates any law of the State, and providing that, when a child under sixteen is arrested, he shall be taken directly before the juvenile court, and that, if he is taken before a justice of the peace or police magistrate, or any other official or court having jurisdiction of the alleged offense, it shall be the duty of such court or official to transfer the cause to the juvenile court, and the officer having the child in charge shall take him before that court. *Sams v. State*, 188.

See STATUTES AND STATUTORY CONSTRUCTION.

INJUNCTION—INSURANCE.

INJUNCTION

1. *Right to invoke. Exclusive franchise.*

Where the plaintiff street railway company has a franchise from the city, its franchise is a property right, under which it can restrain any person from becoming a common carrier of passengers in competition with it without legislative or municipal authority, and for that purpose its franchise is exclusive against all persons upon whom similar rights have not been conferred. *Memphis St. Ry. Co. v. Rapid Transit Co.*, 99.

2. *Right to remedy. Doubtful case.*

An injunction will not be awarded to protect an alleged right, except upon a clear case. *Ib.*

3. *Right to remedy. Grounds.*

Where, under an act of the legislative, municipalities are authorized to regulate by ordinance, subject to the statute, the operation of jitney busses as common carriers, and the city counsel fails to regulate, a street railway company can have the operation of jitneys enjoined, since the city council might fail to act at all under the statute, and thus the rights of the company be unlawfully invaded. *Ib.*

4. *Municipal corporations. Unauthorized operation of jitneys. Nuisance.*

Where statute authorizes the regulation of jitneys, and prohibits their operation, except upon conditions named, and those conditions are not fulfilled, but many jitneys are operated with consequent danger to persons and property, they constitute a nuisance, and may be enjoined on the bill of a private individual who can show special damage to himself. *Ib.*

5. *Municipal corporations. Obstruction of streets. Right to remedy.*

Relief by an injunction against a nuisance by which the highway is obstructed need not be sought by an abutting owner, but may be had by any individual who can show special damage to himself. *Ib.*

INSURANCE

1. *Life companies. Right to erect building.*

Shannon's Code, sec. 2272, authorizes life companies to purchase and hold any real estate necessary for the transaction of the corporate business. Acts 1907, ch. 458, entitled an act to regulate the investment of the funds of domestic life compa-

INSURANCE.

INSURANCE—Continued.

nies, provides in section 3 that such companies may acquire land such as shall be requisite for convenient accommodation in the transaction of business, but that all other lands shall be disposed of. *Held*, that the directors of such companies should be given considerable latitude in determining the character of the building which shall be erected for a corporate home, and they may erect a large office building worth more than the combined capital stock and surplus of the company, not all of which is then necessary for the needs of the company for that will tend, where the land is very valuable, to reduce their rents. *State Life Ins. Co. v. Dunbar*, 331.

2. *Life companies. Power of insurance commissioner.*

While Shannon's Code, sec. 5165 *et seq.*, authorizes state officials to call in question before the courts any excess of corporate action, and Acts 1907, ch. 458, sec. 3, subsec. 4, declares that life companies shall dispose of land not necessary for the accommodation of their business within two years and shall not hold property for a longer period without a certificate from the insurance commissioner extending time for the sale of such property, the consent of the insurance commissioner to the acquisition of land and the erection of a building for the home office is not necessary. *Ib.*

3. *Accident insurance. "Accidental means."*

An injury is not produced by accidental means, within the terms of a policy, where it is the natural result of an act or acts in which the insured intentionally engages, and is caused by a voluntary, natural, ordinary movement, executed as was intended. *Stone v. Fidelity & Casualty Co.*, 672.

4. *Accident insurance. "Accidental means."*

Complainant, who attended a football game on a cool day when the ground was damp, and contracted a cold, resulting in lumbago, and who after medical treatment and the debility resulting from a purgative, and while lying in bed, had a paper brought, reached for it, and raised it suddenly above his head, when his strong blood pressure caused a rupture of the retina, destroying the sight of one eye, could not recover on a policy insuring him against bodily injury through "accidental means" since, while the result was not foreseen, the cause producing the result was not accidental, but an ordinary natural movement, executed as intended. *Ib.*

INSTRUCTIONS—JURY.

INSTRUCTIONS

1. *Railroads. Actions for injury or death. Confusing instructions.*

In an action for the death of a person struck by a railroad train while standing at a point on a sharp curve, it was the theory of the company sustained by proof that a south-bound train was so interposed between deceased and the engine which struck him that deceased and his companion could not be seen from the engine. Plaintiff requested a charge that, if deceased could have been seen on the track by one on the lookout ahead before the view was cut off by the south-bound train, the law required that he be seen, and, though the the south-bound train subsequently cut off the view, it was the duty of those operating the train to reduce the speed and bring the train under such control as to make certain that it could be stopped after he could again be seen and before striking him. The court so charged, with the modification that, if deceased again appeared upon the track, it was the duty of those on the engine not to so control the train as to be certain that it could be stopped before striking deceased, but to sound the alarm, put down the brakes, and use every possible means to stop the train and prevent the accident. *Held*, that this instruction, with the modification, was at least confusing to the jury. *Railroad v. Wright*, 74.

2. *Appeal and error. Harmless error.*

In an action for the price of goods sold, where the verdict was manifestly reached on the ground that the buyer had a right to rescind, the charge of the trial court on the defense of set-off or recoupment, as to which no damages were shown upon which the verdict might have been reached, was not prejudicial. *Monogram Mfrs. v. Johnson*, 571.

JITNEYS

See CARRIERS

JURY

Trial. Demand.

Shannon's Code, sec. 4611 (Acts 1875, ch. 4, as amended by Acts 1889, ch. 220), declares that, when any civil suit is triable by jury, either party desiring a jury shall demand the same in his first pleading, tendering an issue triable by jury, or he shall call for the same on the first day of any trial term, and have an entry on the docket that he calls for a jury, and, unless such demand and entry is made, the court shall try the

JUDGMENTS AND DECREES—JURISDICTION.

JURY—Continued.

case without a jury. Sections 4616 and 4673 require the clerk to keep two dockets, styled, respectively, "nonjury" and "jury" dockets. Three days before the first day of the term defendant's counsel, by an entry in the clerk's docket, demanded a jury trial. *Held* that, as the amendatory act provided for demand other than with the first pleadings, and as the court cannot in a case triable by jury deny that right, the demand was sufficient, although not made to the court on the first day of the term. *Life & Acc. Ins. Co. v. Jordan*, 495.

JUDGMENTS AND DECREES

Personal judgments. Character of notice.

No personal judgment can be rendered against a nonresident served with notice only by publication. *Perry v. Young*, 522.

JURISDICTION

1. *Executors and administrators. Jurisdiction to appoint. Existence of "assets." "Chattel." "Goods and chattels." "Estate." "Goods, chattels, or assets or any estate, real or personal." "Chose in action."*

Under Shannon's Code, sec. 3935, providing that letters of administration may be granted upon the estate of a nonresident by the county court of any county where deceased had any goods, chattels, or assets or any estate, real or personal, at the time of his death, or where the same may be when the letters are applied for, or where any suit is to be brought, prosecuted, or defended in which the estate is interested, an administrator may be appointed in the county in which the decedent was wrongfully killed, though the cause of action for the wrongful death is the only asset in the county, and there are no technical assets. Since the word "chattels" includes not only personal property in possession, but choses in action, the term "goods and chattels" is of very wide signification, and includes choses in action. The term "choses in action" includes rights of action for tort. The word "assets," as used in the administration statutes, though usually meaning items subject to payment of the debts of the decedent, is not wholly limited to this meaning, but has been applied to money collected by an administrator as damages for the wrongful killing of an intestate. The word "estate," though in its primary and technical sense referring only to an interest in land, as used with reference to a decedent's property,

JURISDICTION.

JURISDICTION—Continued.

has acquired a wider application in a popular sense and refers to the entire mass of decedent's property, both real and personal, while the words "goods, chattels, or assets or any estate, real or personal," include every kind of property of any nature whatsoever, and are not limited to technical assets subject to the payment of debts. *Sharp v. Railroad*, 1.

2. *Death. Actions for wrongful death. Law governing.*

A right of action for wrongful death is governed by the laws of the State where the injury occurred. *Ib.*

3. *Executors and Administrators. Jurisdiction to appoint. Existence of assets.*

An administrator may be appointed to bring an action for wrongful death wherever the defendant may be found, though the decedent was a nonresident and left no assets in the State other than such right of action, and though he sustained the injuries causing his death in another State, as the right of action itself is property and is transitory, and exists wherever the defendant may be found. *Howard v. Railroad*, 19.

4. *Courts. Transitory actions. Actions for wrongful death.*

A right of action for wrongful death is transitory and may be enforced against the defendant wherever he may be found, provided it is not contrary to the policy of the forum and is allowed by the State wherein the injury occurred, except in those cases controlled by federal statutes. *Ib.*

5. *Railroads. Farm crossings. Construction.*

The chancery court has jurisdiction to compel a railroad company to make a grade crossing to allow an owner of land on both sides of the track to pass from one side to the other. *Shipp v. Belt Ry. Co.*, 238.

6. *Equity. Actions "quasi in rem."*

The insured in a life policy who had assigned it to his mother, who thereafter died, sued to reform the policy to conform with the assignment agreement between himself and his mother, that on his mother's death the policy should revert to him. The insurance company appeared by the insurance commissioner. Other resident defendants were personally served. Nonresident distributees of the assignee were served by publication in a collateral attachment proceeding against their distributive shares in the policy. Defendant insurance company demurred to the jurisdiction, alleging that the court had no jurisdiction of the nonresident distributees.

LANDS AND LAND TITLES—LEGITIMACY.

JURISDICTION—Continued.

Held that, since the suit was to settle the interests of those made parties, it was *quasi in rem*, so that the court, having jurisdiction of the *res*, or the policy, had jurisdiction of the whole cause and could by its judgment bind the nonresident distributees. *Perry v. Young*, 522.

LANDS AND LAND TITLES

1. *Husband and wife. After acquired property. Estates by the entirety.*

Where a deed of land is to a husband and wife, an estate therein is by the entirety, and not in common, so that, on the death of one, the other takes the land absolutely. *Bennett v. Hutchens*, 65.

2. *Husband and wife. Conveyance to wife. Formal sufficiency. Recital of consideration. Title.*

Where one conveyed land in fee to C., who in turn conveyed it to grantor's wife, by a deed containing apt words for the creation of a separate estate, such estate was vested in the wife unincumbered by any rights of the husband, though, as a matter of fact, there was no payment of the valuable consideration recited in each deed. *Battle v. Olaiborne*, 286.

See POSSESSION

LEGITIMACY.

1. *Bastards. Evidence. Presumption of legitimacy.*

The presumption of the legitimacy of a child born during wedlock is indulged, though antenuptial conception is made to appear. *Jackson v. Thornton*, 36.

2. *Bastards. Evidence. Presumption of legitimacy.*

The presumption of the legitimacy of a child born during wedlock is weakened and may be overcome by a less weight of evidence where antenuptial conception is shown. *Ib.*

3. *Bastards. Evidence. Presumption of legitimacy.*

Though antenuptial conception is shown, clear, strong, and convincing testimony must be adduced to overcome the presumption of the legitimacy of a child born in wedlock, and a mere preponderance is not enough, nor may testimony of mere ru-

 LEGISLATIVE AUTHORITY—LIABILITY.

LEGITIMACY—Continued.

mor and suspicion among neighbors touching the paternity of the child overcome the presumption. *Jackson v. Thornton*, 36.

LEGISLATIVE AUTHORITY

1. *Municipal corporations. Streets. Legislative control. Jitneys.*
The legislature, being endowed with police power to regulate the use of streets in public places, may prescribe the conditions with which jitneys, being common carriers, must comply in order to operate. *City of Memphis v. State*, 83.
2. *Drains. Power to establish.*
In the absence of restriction, the legislature has plenary power over the establishment of drainage districts. *In re Drainage Dist.*, 684.

LIABILITY

1. *Commerce. Liability for injuries. Statutory provisions.*
The federal Employers' Liability Act (Act April 22, 1908, ch. 149, 35 Stat. 65 [U. S. Comp. St. 1913, secs. 8657-8665]) in the cases to which it applies is necessarily supreme. *Howard v. Railroad*, 19.
2. *Master and servant. Liability for injuries. Failure to warrant.*
An employee, working on a mangle, as she stepped down from the platform on which she worked to go back of the machine, slipped on a place where a scrubwoman had just put soapy water. Though she had worked on the mangle only a few hours, it, and the floor about it, were in view of her accustomed working place, and she knew that the scrubwoman mopped the floor about twice a week, and knew, also the route taken by the scrubwoman as she passed the mangle. Her attention had been directed to the machine, which was so hot that it would burn one's hand, but on leaving the machine she had nothing to do but keep away from the machine. *Held*, that the danger of slipping was so simple and obvious that it was not incumbent on the employer to warn her of the danger, and it was immaterial that she had been absorbed in her work, as she was relieved of this tension when she stepped down and away. *Standard Knitting Mills v. Hickman*, 43.
3. *Master and servant. Liability for injuries. Unsafe "place" to work.*
The word "place," within the rule requiring an employer to furnish a safe place of work, means the premises, or some

LIABILITY.

LIABILITY—Continued.

part of the premises, where the work is done, and does not comprehend mere negligent acts of fellow servants rendering the place dangerous for the time being, as by way of some transient peril. *Ib.*

4. *Railroads. Injuries to persons on track. Rate of speed on curves.*

As a precaution against injury to persons walking on the track, but not seen or known so to be, there is no duty to slacken the ordinary speed of a train approaching a curve in the open country, though the curve be in whole or in part in a cut or hidden from view by a train going in the opposite direction on the concave side of the curve. *Railroad v. Wright*, 74.

5. *Commerce. Injury to servant engaged in superintendence.*

A railroad employee at the shop of defendant railway, an interstate carrier, where it built and repaired cars used by intrastate and interstate commerce, and which at times were in no service at all, and where it painted its cars, the paint for which was brought in large quantities to its freight depot two miles from the shop, whence, after a carload had accumulated, it was hauled out to the shops, and the paint placed in a storehouse to be drawn for use, who had the superintendence of the unloading of the paint from the car, but nothing to do with its use, and who, among his general duties, looked after the issuance of the iron from the iron house to the various shops in the yard and superintended the unloading of iron and issuing it or pointing it out when called for, and who, after directing a number of men how to unload a car of paint, turned his back and was talking to another person about the iron when he was struck and fatally injured by a barrel of paint which slipped from the skid by reason of workman's negligence, was then engaged in superintending the unloading so far as that was interstate commerce. *Salmon v. Southern Ry. Co.*, 224.

6. *Commerce. Employers' liability act. Railroad employee. "Interstate commerce."*

Such employee, while directing the unloading of barrels of paint from the car, or while standing near talking with another person about a pile of iron, also within the scope of his duties, was not doing any act or duty having important connection with interstate commerce, and hence was not "engaged in interstate commerce" within the federal Employers' Liability Act April 22, 1908, ch. 149, 35 Stat., 65 (U. S. Comp. St., 1913,

LIABILITY.

LIABILITY—Continued.

secs. 8657-8665), so as to entitle his widow to recover for his death from the negligence of his fellow servants. *Salmon v. Southern Ry. Co.*, 224.

9. *Physicians and surgeons. Care.*

While a physician does not guarantee the cure of his patients, and is not liable for an error in diagnosis, yet in performing an operation he is employing surgery as an art, and is liable for negligence. *Burnett v. Layman*, 323.

8. *Banks and banking. Officers and directors. Liability to bank. Action. Premature character.*

A bill was prematurely brought at the chancellor's direction by the receiver of an insolvent bank against its officers and directors to recover for loans negligently made by them, whereby the insolvency was brought about, where the debtors were not wholly insolvent when suit was brought, but collections might yet be made from them, since there can be no recovery for negligence without damages resulting therefrom, but it would be otherwise where such insolvency existed. *Green v. Officers & Directors of Trust Co.*, 609.

9. *Banks and banking. Officers and agents. Liability to bank. Negligence as to loans.*

A bill filed at the instance of the chancellor by the receiver of an insolvent bank to recover of officers and directors for loans negligently made was maintainable although the assets of the bank were not first exhausted, since the suit was by the bank itself, i. e., by its receiver in its right, to hold its agents, the directors, liable for negligence, and the measure of damages was the amount of the negligent loans finally lost after due efforts to collect. *Ib.*

10. *Banks and banking. Officers and agents. Liability to bank at common law.*

Under the common law a bank itself has the right to redress for injuries inflicted upon it by the acts denounced by Shannon's Code, sections 2067, 2068, and 3242, providing that intentional fraud in failing to comply with the articles of incorporation, or in deceiving the public or individuals in relation to their liabilities, subjects all officers, stockholders, or directors, knowingly participating therein, to damages at the suit of any person injured; that the diversion of the funds of the banks, the payments of dividends leaving insufficient funds to meet its liabilities, the keeping of false books or accounts, whereby any one is injured, and the making and

LIBEL AND SLANDER—LICENSEES.

LIABILITY—Continued.

publishing of false reports, are such frauds as will subject those actively concerned to damages at the suit of any person injured; and that any director of any bank who shall be guilty of any fraud or willful mismanagement by which loss shall fall upon its creditors shall be individually liable for such loss. *Ib.*

11. *United States. Contracts. Bond of contractor. Liability on.*
A bank which furnishes money to a federal contractor to pay for materials or labor does not come within a bond guaranteeing performance of the contract, and conditioned that the contractor shall promptly make payment to all persons supplying labor or material. *People's Nat. Bank v. Corse*, 720.

LIBEL AND SLANDER

See TORTS

LICENSEES

1. *Master and servant. Injuries to servant. Relation.*
A servant who is temporarily laid off, and goes upon his master's premises to assist another servant in getting his tools is not "employed," but is a mere licensee, so that his administrator cannot recover for his death except upon a showing of willful or malicious injury. *Westborne Coal Co. v. Willoughby*, 257.
2. *Negligence. New dangers. Duty.*
Where a licensee is injured by a sudden or new peril, the owner of the premises is under duty to warn him of the danger if he has notice of it. *Ib.*
3. *Negligence. Active negligence. Duties to.*
There is no duty to a licensee upon a landowner over whose property he has been accustomed to go, to arrange his property to safeguard the licensee his only duty being to give timely warning of danger, and to do no act willfully to injure the licensee. *Ib.*
4. *Negligence. Custom.*
The owner of a business may, as to licensees, operate it in the customary way, though that be negligent, unless he knows that they may be injured by his negligence, or are in danger, or by their habits may become endangered. *Ib.*

LICENSES—LIMITATION OF ACTIONS.

LICENSES**1. Carriers. Jitneys.**

Under Acts 1915, ch. 60, making jitneys common carriers, and requiring them, under ordinances of the cities or towns, to file bonds and perform the conditions of the statute and ordinances, a jitney company is altogether without right to do business on the streets of a city, where the city has passed no ordinance pursuant to the act, and the company has failed to procure any license or execute any bond under the act. *Memphis St. Ry. Co. v. Rapid Transit Co.*, 99.

2. Torts. Resort to legal proceedings. Petition to revoke. Merchant's license.

Where a number of residents of a town petitioned the mayor and board of aldermen to revoke the defendant's license as a general merchant on the ground that his store was a public nuisance, pursuant to which the board illegally revoked the license, but the petition was signed and presented without malice and in the honest belief that the board had power to act, defendants were not liable for plaintiff's loss occasioned by the revocation, since their action was a lawful exercise of the right to apply by address to government authorities for the redress of grievances secured by Const. art. 1, sec. 23. *McKee v. Hughes*, 455.

3. Nonpayment of occupation tax. Action on contract.

One pursuing an occupation defined as a privilege by statute cannot recover on a contract made in pursuance of the business, if he has not paid his privilege tax. *Morton v. Imperial Realty Co.*, 681.

LIMITATION OF ACTIONS**1. Disabilities. Nonresidence. Removal of disabilities. Effect.**

Under Shannon's Code, sec. 4448, providing that persons beyond the limits of the United States and the territories thereof when the cause of action accrued shall be excepted from the operation of the statute of limitations, nonresident plaintiffs cannot maintain their action based upon a cumulative disability, but can rely only upon their own disability, and not upon a disability of their ancestor in interest upon whose death primary disability ceased. *Jones v. Mining & Mfg. Co.*, 159.

2. Exceptions. Burden of proof.

While the burden of proof is on the party asserting the bar of the statute of limitations to show that his opponent is barred, when such showing is made, then burden shifts to

MASTER AND SERVANT.

LIMITATION OF ACTIONS—Continued.

the other party to show that he has been at all times within an exception of the statute. *Ib.*

3. *Nonresidence of plaintiff. Evidence.*

In an action in which the two plaintiff trustees relied on the exception of absence from the country to save their cause of action from the statute of limitations, evidence *held* not to show that their several visits to the United States were never concurrent, so that they failed to bring themselves within the exception of the statute. *Ib.*

4. *Time of bringing suit. Effect.*

Where plaintiffs were under the disability of nonresidence, and therefore not subject to the statute of limitations, and their exception was removed by statute, within two years of which time they brought their action, their cause is saved, so as to prevent subsequent acquisition of title by adverse possession against them, in spite of the fact that it is subsequently dismissed, when a new action is brought within one year from such dismissal. *Ib.*

MASTER AND SERVANT

1. *Liability for injuries. Failure to warrant.*

An employee, working on a mangle, as she stepped down from the platform on which she worked to go back of the machine, slipped on a place where a scrubwoman had just put soapy water. Though she had worked on the mangle only a few hours, it, and the floor about it, were in view of her accustomed working place, and she knew that the scrubwoman mopped the floor about twice a week, and knew, also the route taken by the scrubwoman as she passed the mangle. Her attention had been directed to the machine, which was so hot that it would burn one's hand, but on leaving the machine she had nothing to do but keep away from the machine. *Held*, that the danger of slipping was so simple and obvious that it was not incumbent on the employer to warn her of the danger, and it was immaterial that she had been absorbed in her work, as she was relieved of this tension when she stepped down and away. *Standard Knitting Mills v. Hickman*, 43.

2. *Liability for injuries. Unsafe "place" to work.*

The word "place," within the rule requiring an employer to furnish a safe place of work, means the premises, or some part of the premises, where the work is done, and does not

MORTGAGES—MUNICIPAL CORPORATIONS.

MASTER AND SERVANT—Continued.

comprehend mere negligent acts of fellow servants rendering the place dangerous for the time being, as by way of some transient peril. *Standard Knitting Mills v. Hickman*, 43.

3. *Injury to servant. Danger. Assurances of foreman. Contributory negligence.*

A foreman, a man of large experience in the construction of ditches, had his attention called to the danger of working in a certain ditch about ten feet deep by a person laboring therein who had little such experience, and the foreman pronounced the ditch safe and the earth of the walls was not of such character as to give warning of imminent danger. *Held*, that the laborer was not negligent in accepting the assurances of the foreman and continuing work there. *City of Chattanooga v. Powell*, 137.

4. *Injury to servant. Foreman. Authority. Assurances of safety.*

Where a foreman has authority to decide whether a ditch needs bracing, has charge of the work, and has been given directions how and when the work shall be done, and has charge of the servants, he is authorized to give to the servants assurances of the safety of the ditch which will bind his employer in a suit by a servant for personal injuries by a cave in. *Ib.*

5. *Injuries to servant. Relation. License.*

A servant who is temporarily laid off, and goes upon his master's premises to assist another servant in getting his tools is not "employed," but is a mere licensee, so that his administrator cannot recover for his death except upon a showing of willful or malicious injury. *Westborne Coal Co. v. Wiloughby*, 257.

MORTGAGES

See REFORMATION OF INSTRUMENTS.

MUNICIPAL CORPORATIONS

Streets. Legislative control. Jitneys.

The legislature, being endowed with police power to regulate the use of streets in public places, may prescribe the conditions with which jitneys, being common carriers, must comply in order to operate. *City of Memphis v. State*, 83.

NEGLIGENCE—NUISANCE.

NEGLIGENCE

1. *Master and servant. Injury to servant. Danger. Assurances of foreman. Contributory.*

A foreman, a man of large experience in the construction of ditches, had his attention called to the danger of working in a certain ditch about ten feet deep by a person laboring therein who had little such experience, and the foreman pronounced the ditch safe and the earth of the walls was not of such character as to give warning of imminent danger. *Held*, that the laborer was not negligent in accepting the assurances of the foreman and continuing work there. *City of Chattanooga v. Powell*, 137.

2. *New dangers. Duty.*

Where a licensee is injured by a sudden or new peril, the owner of the premises is under duty to warn him of the danger if he has notice of it. *Westborne Coal Co. v. Willoughby*, 257.

3. *Active. Duties to licensees.*

There is no duty to a licensee upon a landowner over whose property he has been accustomed to go, to arrange his property to safeguard the licensee his only duty being to give timely warning of danger, and to do, no act willfully to injure the licensee. *Ib.*

4. *Licensees. Custom.*

The owner of a business may, as to licensees, operate it in the customary way, though that be negligent, unless he knows that they may be injured by his negligence, or are in danger, or by their habits may become endangered. *Ib.*

5. *"Active negligence." What constitutes.*

Active negligence includes all inadvertent acts causing injury to others, resulting from failure to exercise ordinary care, and all acts the effects of which are unforeseen through want of proper attention. *Ib.*

See LIABILITY.

NEGOTIABLE INSTRUMENTS

See BILLS AND NOTES

NUISANCE

Municipal corporations. Unauthorized operation of jitneys. Injunction.

Where statute authorizes the regulation of jitneys, and prohibits their operation, except upon conditions named, and those con-

PARTNERSHIP—PLEADING AND PRACTICE.

NUISANCE—Continued.

ditions are not fulfilled, but many jitneys are operated with consequent danger to persons and property, they constitute a nuisance, and may be enjoined on the bill of a private individual who can show special damage to himself. *Memphis St. Ry. Co. v. Rapid Transit Co.*, 99.

PARTNERSHIP

Fraudulent conveyances. Sale in bulk. Property. Notice to individual creditors.

While notice of sale in bulk of a firm's stock in trade to one of the partners should have been given the individual creditors of the selling partners, they cannot attack it as fraudulent; payment of the partnership creditors, assumed by the buyer, consuming the whole stock. *Gilbert v. Ashby*, 370.

PHYSICIANS AND SURGEONS**1. Care.**

While a physician does not guarantee the cure of his patients, and is not liable for an error in diagnosis, yet in performing an operation he is employing surgery as an art, and is liable for negligence. *Burnett v. Layman*, 323.

2. Actions for malpractice. Evidence. Sufficiency.

In an action for injuries received when defendant sounded the urethra, evidence held to warrant a finding of negligence. *Ib.*

3. Malpractice. Negligence.

A physician after he had seriously injured his patient in sounding the urethra, causing keen suffering and bleeding, is not warranted in leaving his patient without giving immediate relief, for a doctor who undertakes the treatment of a case may not abandon his patient until the facts justify cessation of attention or he gives the patient due notice that he intends to quit the case and an opportunity to procure other medical attention. *Ib.*

PLEADING AND PRACTICE**1. Ejectment. Actions. Sufficiency.**

Pleadings in ejectment were sufficient, where title was averred upon one hand and denied upon the other, regardless of failure to plead details. *Jones v. Mining & Mfg. Co.*, 159.

2. Criminal law. Bill of exceptions. Necessity.

A plea, when stricken, ceased to be a part of the record, and to make it a part of the record so that it could be reviewed,

PLEADING AND PRACTICE.

PLEADING AND PRACTICE—Continued.

it was necessary to incorporate it into a bill of exceptions, together with the court's action in respect to it. *Sams v. State*, 188.

3. *Abatement and revival. Pending action. Abandonment. What constitutes.*

Where process in a former action was returned unserved, and plaintiff did not sue out alias writs from term to term, the original action was abandoned and discontinued within Shannon's Code, sec. 4445, declaring that the suing out of a summons is the commencement of an action if the action is continued by the issuance of alias process from term to term, and the second action could not be abated on the ground of a former action pending. *Walker v. Vandiver*, 423.

4. *Abatement and revival. Former action pending.*

Defendant, a citizen of one county, removed to another county to avoid service, and was served in an action begun there. thereafter he returned to the county of his residence and plaintiff then begun a new action in that county, defendant being duly served. He filed a plea in abatement and, after the filing of such plea, the first action was dismissed. *Held*, that in such case the dismissal occurring before the filing of the replication to the plea, the plea must be denied. *Ib.*

5. *Equity. Dismissal of bill. Effect as to cross-bill.*

The complainant's dismissal of the original bill ordinarily carries with it the cross-bill or the answer when filed as a cross-bill; but, where neither the cross-bill nor the answer filed as a cross-bill sets up ground for affirmative relief on which proof has been taken, the dismissal of the original bill does not carry with it the cross-bill or answer filed as a cross-bill, but leaves such cross-bill in court for prosecution to final decree. *McDowell v. Hunt Contracting Co.*, 437.

6. *Equity. Dismissal of bill. Effect as to cross-bill. New matter.*

Complainant, member of a firm, filed his bill to attach and impound defendant's judgment against the firm to satisfy an indebtedness due him from the defendant, and made the defendant's solicitor in the recovery of the judgment, having a lien thereon to secure his reasonable fee, a party defendant, that the court might determine the amount of his fee, and that complainant might subject the remainder of the judgment to his own claim, and the defendant answered denying any liability, and filed its answer as a cross-bill against the solicitor to

PLEADING AND PRACTICE

PLEADING AND PRACTICE—Continued.

have his fee adjudicated; jurisdiction over the solicitor, a non-resident, being obtained in the county by the fact that another party defendant to the original bill resided in that county. The complainant and the defendant compromised their differences, and the complainant's firm agreed to pay a certain amount into court upon the solicitor's release of his lien, which was done, whereupon complainant dismissed his suit, and the chancellor, on motion of the defendant solicitor, dismissed the cross-bill. *Held*, on defendant's appeal from the dismissal of the cross-bill, that such dismissal was proper, as after the dismissal of the original bill the jurisdiction over the defendant to the cross-bill was released, and there was no reason for holding him before the court, and the cross-bill sought no new matter but the same relief. *McDowell v. Hunt Contracting Co.*, 437.

7. *Equity. Cross-bill. Answer.*

While the statute, Shannon's Code, sec. 6133, allows an answer to be filed as a cross-bill against the original complainant, it is improper to incorporate in an answer to the bill a cross-bill against other parties. *Ib.*

8. *Equity. Bill. Sufficiency.*

Where a bill set out the facts showing complainant to be entitled to relief, and concluded with a general prayer, it is sufficient, though not in so many words stating the theory upon which complainant was entitled to relief. *Elledge v. Anderson*, 478.

9. *Equity. Special issues.*

Generally, when in an equity case there are several issues of fact submitted to a jury, they must find on all or none, and a verdict on one or more is not valid. *Minton v. Wilkerson*, 484.

10. *Equity. Special issues.*

In a suit to recover complainant's alleged interest in the estate of his wife, where he attacked the validity of his release of the same, and the jury, to which special issues of fact were submitted, found in favor of the validity of the release, but failed to find on issues as to separation of complainant and his wife presented by defendants, the failure is immaterial and will not deprive defendants of a decree in their favor. *Ib.*

11. *Equity. Demurrer.*

Demurrer to the bill as a whole which is not good to the whole

PLEADING AND PRACTICE.

PLEADING AND PRACTICE—Continued.

must be *held bad in toto*. *Green v. Officers & Directors of Trust Co.*, 609.

12. *Equity. Disregard of foreign matter.*

Foreign matter contained in a pleading must be disregarded on demurrer. *Ib.*

13. *Action. Misjoinder of causes of action. Parties involved.*

A bill by the receiver of an insolvent bank at the instance of the chancellor to recover of officers and directors for loans negligently made was not bad for misjoinder of parties complainant on the ground that it was substantially one by creditors and stockholders to enforce their respective rights against the directors, while a right of action of creditors is *ex delicto*, depending on intentional fraud or willful mismanagement, and that of stockholders is based on contract, sustainable by proof of gross negligence alone, since the suit was in legal effect by the bank itself. *Ib.*

14. *Banks and banking. Officers and agents. Liability to bank. Action.*

The allegations of a bill by the receiver of an insolvent bank at the instance of the chancellor against its officers and directors to recover for fraud, willful mismanagement, and negligence bringing about the insolvency, that the defendants carried as solvent large assets in fact insolvent, published false statements, carried as cash items tickets, miscellaneous papers, and overdrafts which would be lost to the bank through insolvency, that the directors were guilty of negligence in permitting officers to extend to themselves a heavy line of credit and to lend to concerns in which they were personally interested large amounts of money, which would prove nearly a total loss, all of which could have been prevented by the directors by the exercise of ordinary diligence, were sufficient to justify overruling a demurrer, since to make a case against the directors it was unnecessary to allege they were guilty of fraud and willful mismanagement, the allegations of negligent conduct being sufficient, though allegations showing fraud and willful mismanagement would have been proper. *Ib.*

15. *Equity. Multifariousness.*

A bill by the receiver of an insolvent bank filed at the instance of the chancellor against its officers and directors to recover for loans negligently made, which joined directors who served five full terms and those who served only a part of such five

PLEADING AND PRACTICE.

PLEADING AND PRACTICE—Continued.

terms, was multifarious as to the short term defendants, though the defendants who served during all the terms could not object that the others were included with them for any period of time within the years during which they served, as they were connected with each of all the defendants in some part of the litigation. *Green v. Officers & Directors of Trust Co.*, 609.

16. *Equity. Multifariousness.*

Whether a bill should be declared multifarious is largely a matter of discretion controlled by considerations of the inconvenience to the parties and the court of permitting the examination of disconnected controversies in the same litigation. *Ib.*

17. *Equity. Demurrer.*

The allegations of a bill must be taken as true by the appellate court on hearing to review a decree dismissing the bill on demurrer. *Ib.*

18. *Equity. Demurrer.*

Every reasonable presumption must be indulged in favor of a bill when opposed by a demurrer. *Ib.*

19. *Banks and banking. Officers and agents. Liability to bank. Action.*

A bill by the receiver of an insolvent bank, filed at the instance of the chancellor, to recover against its officers and directors for loans negligently made, did not need to set out the particular circumstances of each loan, showing the situation and surrounding of the parties, since all complainant was required to do was to make a *prima facie* case of negligence. *Ib.*

20. *Banks and banking. Officers and agents. Liability to bank. Action.*

In suit by the receiver of an insolvent bank at the instance of the chancellor to recover against its officers and directors for loans negligently made, the fact that a large number of items catalogued in the bill as cash items and overdrafts were undated did not render the bill demurrable as to defendants who served five full directorates, the period sued for; it being alleged that the items occurred during such period. *Ib.*

21. *Demurrer.*

Defenses not appearing on the face of complainant's bill cannot be taken advantage of by defendant in its demurrer. *Johnson City v. Eastern Elec. Co.*, 632.

POSSESSION—PRINCIPAL AND AGENT.

PLEADING AND PRACTICE—Continued.

22. *Licenses. Nonpayment of occupation tax.*

Where, in suit on a contract made in pursuance of a business defined as a privilege by statute, the defendant pleads that the plaintiff has not paid his privilege tax, the burden to prove the fact so pleaded is on defendant, as the defense is essentially affirmative, and the plea evidence of extrinsic matter. *Morton v. Imperial Realty Co.*, 681.

23. *Eminent domain. Telegraph and railways. Ways. Condemnation.*

A petition by a telegraph company for condemnation of a way for a line of telegraph along a railroad right of way, brought under Acts 1885, chapter 66, section 1, authorizing such condemnation, providing that the ordinary use of such railroad shall not be thereby obstructed, is not bad because the petition declared that the telegraph line would not obstruct the use of the right of way for railroad purposes, and offered to move the line in case the right of way should be obstructed. *Western Union Tel. Co. v. Railroad*, 691.

See APPEAL AND ERROR

POSSESSION

1. *Adverse. Possession of portion of tract. Effect.*

Where one seeking to establish title by adverse possession shows possession of a portion of the tract under color of title, his possession extends constructively to the whole tract. *Jones v. Mining & Mfg. Co.*, 159.

2. *Adverse. Requisites. Exclusive possession. Effect of double claims.*

Although the true owner of land against whom an adverse claim is asserted has presumptive title to all land not within the actual inclosures of the adverse claimant, that is not true of a mere trespasser; and possession by two adverse claimants, neither of which has title, neutralizes the possession of each in the overlap, priority of possession creating no advantage. *Jones v. Mining & Mfg. Co.*, 183.

See DEEDS; EVIDENCE.

PRINCIPAL AND AGENT

1. *Liability of agent of undisclosed principal.*

Agent innocently presenting a false bill of lading made by his
133 Tenn. 50

REPLEVIN—SALES.

REPLEVIN

1. *Actions. Right to maintain.*

A mere equitable title will not support replevin. *Type & Elec. Foundry v. Carter*, 489.

2. *Chattel mortgages. Equitable assignments.*

Where notes secured by a chattel mortgage were indorsed, but the mortgage was not assigned, the notes, while carrying with them the equitable title to the mortgage, did not carry such title as would warrant the holder in maintaining replevin in his own name for the mortgaged chattels. *Ib.*

SALES

1. *Fraudulent conveyances. Sale in bulk. Partnership property. Notice to individual creditors.*

While notice of sale in bulk of a firm's stock in trade to one of the partners should have been given the individual creditors of the selling partner, they cannot attack it as fraudulent; payment of the partnership creditors, assumed by the buyer, consuming the whole stock. *Gilbert v. Ashby*, 370.

2. *Fraudulent conveyances. Partial validity of transaction. Right of grantee. Resulting trusts.*

Complainant purchased a one-half interest in a stock of goods in violation of the Bulk Sales Law (Laws 1901, ch. 133). Thereafter the seller having died, he acquired the remaining one-half interest on the understanding that creditor's liens should be discharged by the administrator and the seller's widow. The money paid for the second interest could be identified in a bank. *Held* that, as the seller's creditors could have followed the money, and as the whole of the stock was liable for their demands, complainant, who had paid the demands of of creditors, was entitled to impress a trust upon such funds, notwithstanding the seller's widow at the time of the sale was mentally incompetent. *Elledge v. Anderson*, 478.

3. *Breach of contract. Remedy of buyer. Rescission.*

Where plaintiff, selling goods to defendant, represented that defendant was to handle the goods exclusively in his city, without which inducement the contract would not have been made, defendant's subsequent sale of the same goods to another dealer in that city was a breach of a material part of the contract, so that, regardless of whether there was fraud, the buyer was entitled to rescind. *Monogram Mfrs. v. Johnson*, 571.

SERVICE.

SALES—Continued.

4. *Fraud. Representations. Expression of intention.*

A representation amounting to a mere expression of intention, though false, is not a fraud at law; but a representation amounting to an engagement binds the party making it to make it good. *Ib.*

5. *Breach. Effect.*

A buyer may be discharged if there is a breach of the contract by the seller in some substantial particular which goes to the essence of the contract and renders the seller incapable of performance, or of performance as intended. *Ib.*

SERVICE

Judgment. Personal judgments. Character of notice.

No personal judgment can be rendered against a nonresident served with notice only by publication. *Perry v. Young*, 522.

STATUTES AND STATUTORY CONSTRUCTION

1. *Revisions and compilations. Construction.*

Though the substance of Shannon's Code, sec. 3935, relative to the jurisdiction to appoint administrator of the estates of nonresidents was enacted prior to the Code of 1858, with which the right of action for wrongful death originated, it having been made a part of that Code along with the sections giving the right of action for wrongful death, they must be construed together as if they had originated with the Code, as that Code was a single enactment. *Sharp v. Railroad*, 1.

2. *Infants. Delinquent children. Validity.*

Const. art. 1, sec. 14, declares that no person shall be put to answer any criminal charge, but by presentment, indictment, or impeachment. Laws 1911, ch. 58, establishing juvenile courts, declares that any child under sixteen who violates any law shall be deemed a delinquent child, and may be committed to the State reformatory, and that in case the child is incorrigible and incapable of reformation he shall be remanded to the proper courts for the trial of criminal offenses. *Held*, that the statute is not in violation of the constitution; the proceeding not being one penal in its nature, but merely for the protection of the delinquent child. *Childress v. State*, 121.

3. *Construction. Altering common-law.*

A statute intended to alter the common-law will not be construed to alter it further than it expressly declares or is necessarily implied from the fact of it covering the whole subject-matter. *Baker v. Dev.*, 126.

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SERVICE.

SERVICE—Continued.

4. *Infants. Crimes. Criminal procedure. "Delinquent child."*

Where the evidence showed without dispute that defendant was under sixteen at the time of his arrest and at the time of the court's action on a motion in arrest of judgment, it should have sustained the motion and transferred the cause and the custody of defendant to the juvenile court under Acts 1911, ch. 58, defining a "delinquent child" as any child under sixteen who violates any law of the State, and providing that, when a child under sixteen is arrested, he shall be taken directly before the juvenile court, and that, if he is taken before a justice of the peace or police magistrate, or any other official or court having jurisdiction of the alleged offense, it shall be the duty of such court or official to transfer the cause to the juvenile court, and the officer having the child in charge shall take him before that court. *Sams v. State*, 188.

5. *Counties. Partition.*

As the court cannot presume on the intent of the legislature (Priv. Act 1915, ch. 384) which removed from Giles and added to Marshall county a strip of territory, which, in some places, brought the line of Marshall county within eleven miles of Giles county courthouse, the act cannot be sustained by forcing back the line of Marshall county in those places where it came within eleven miles of the county courthouse. *Giles Co. v. Marshall Co.*, 414.

6. *Plurality of subjects.*

Acts 1915, ch. 682, providing for the issuance of bonds by a county to improve its roads without prejudice, and for the sale of said bonds and the building of roads and the appointment of pike commissioners, and to fix their duties and salary, and to provide for the expenditure of the funds and for the levying of a tax to pay the interest on the bonds, and to authorize the work of county prisoners on the pike roads, is not unconstitutional as embracing more than one subject; the entire purpose of the act being only to improve the county roads. *Raulston v. Marion Co.*, 433.

7. *"General law." "Special law." Turnpike roads. Constitutionality.*

Acts 1905, ch. 534, as amended by acts 1907, ch. 242, was in violation of Const. art. 11, sec. 8, forbidding the increase or diminution of the powers of private corporations by special laws, as it did not embrace all of the class to which it was naturally

SERVICE

SERVICE—Continued.

related, and created a preference or established an inequality; a "special law," in the constitutional sense, being one relating to particular persons or things of a class to which they legitimately belong, a law which, by force of no inherent limitation, arbitrarily separates or segregates some person or thing from those upon which but for such separation it would operate; and a "general law," within the provision of such section that corporations shall be formed under general laws, but shall not be created by special laws, is one by which all persons complying with its provisions may be entitled to exercise powers, rights and privilege conferred, while a "special law" confers on certain persons rights and powers, or imposes liabilities not granted to or imposed on other similarly situated (citing 4 Words and Phrases, Second Series, Special Law; see also Words and Phrases, First and Second Series, General Law). *State v. Turnpike*, 446.

8. *Bills and notes. Penal statutes. Construction.*

Acts 1897, ch. 77, requiring notes given for the sale of a patent right or interest therein to show on their face that they are so given, and making a violation thereof a felony, is a penal act, and must be strictly construed. *Cohn v. Lunn*, 547.

9. *Titles. Plurality of subjects. Validity.*

Constitution article 2, section 17, provides that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title. Pub. Acts 1913, ch. 26, was entitled "a general enabling act authorizing counties through their quarterly courts to issue bonds for highway purposes to provide for a retiring indebtedness thus created at or before maturity, and to provides for the expenditures of the fund derived from the bond issue." Section 16 of that chapter was amended by Pub. Acts 1915, ch. 23, to read that nothing in the act shall be construed to repeal or modify any private or special act authorizing any county or municipality through its county court to issue bonds for the purpose of building roads. Pub. Acts 1913, ch. 26, sec. 3, provides for the issuance of bonds when necessary to secure federal co-operation on the roads. Section 6 makes it the duty of the county trustees to collect and account for taxes, and to take advantage of all laws to force the collection of the tax levied to retire the bonds. Section 12 provides that, if all the roads provided for in the enactment are finished, and there is a surplus, it shall be expended as the road commissioners direct. *Held*, that the

SERVICE

SERVICE—Continued.

act did not violate the constitutional provision requiring but one subject. *Walmsley v. Franklin Co.*, 579.

10. *Subjects. Plurality of subjects.*

All the provisions of such act being intended to further its general subject, the improvement of county roads, the act did not violate the constitutional provision requiring that the subject of the act be stated in the title. *Ib.*

11. *Enactment. Veto by executive. Effect of "Adjournment."*

Constitution article 3, section 18, provides in part that if the governor shall fail to return any bill with his objections within five days (Sundays excepted) after presentment to him, it shall become a law without his signature, unless the general assembly, by adjournment, prevents its return, in which case it shall not become a law. *Held*, that "adjournment," as used, means final adjournment of both houses, though as the word is generally used it may be intended to signify either a temporary or a final adjournment, so that a bill which was held by the Governor for thirty-three days before its return vetoed, for thirty days of which both houses of the general assembly were adjourned temporarily pursuant to joint resolution, became a law, as it might have been returned during adjournment within five days with veto to an agent of the house of representatives, in which the bill originated, such as the clerk. *Johnson City v. Electric Co.*, 632.

12. *Enactment. Veto by executive. Return of bill.*

A return of a bill by the governor, with his objections thereto in writing, made to the committee on enrolled bills of the house of origin or to any member thereof, is a good return of the bill and objections within constitution article 3, section 18, providing that the governor's failure to return the bill with objections within five days, Sundays excepted, after presentment to him, causes it to become a law without his signature, unless adjournment of the general assembly prevents such return. *Ib.*

13. *Enactment. Return by governor. Statute. "Adjournment."*

Shannon's Code, sections 227-230, touching the procedure in regard to bills after enrollment, does not amount to a construction of a Constitution article 3, section 18, providing that failure of the governor to return a bill within five days after presentment to him, shall cause it to become a law without his signature, unless return is prevented by adjournment, in con-

STATUTES OF LIMITATION—SUBROGATION.

SERVICE—Continued.

flit with the construction in the section of "adjournment" as meaning "final adjournment." *Ib.*

STATUTES OF LIMITATION

See LIMITATION OF ACTIONS.

STIPULATIONS

Condemnation proceedings. Agreement. Effect.

Where, in condemnation proceedings, by agreement the right was reserved to a co-owner to claim in a future suit incidental damages to another tract of land, her case in such subsequent suit must be viewed as if her claim to damages were being urged in the condemnation proceeding. *Tillman v. Railroad*, 554.

SUBROGATION

1. *Payment of debt. Sufficiency.*

As a surety is not entitled to subrogation until the debt is paid in full, a surety on a bond to secure a city in the deposit of moneys in an insolvent banking institution is not entitled to subrogation, though he has paid the bond, where the bank was still largely indebted to the city, and the total amount of dividends, together with the amount of the bond, would not discharge the obligation; for in such case, if the surety were *pro rata* subrogated to the bank's right to receive dividends, the city would be injured. *Knapp v. Banking & Trust Co.*, 655.

2. *Contracts. Construction.*

Though a bond to secure a city in a deposit of money in a bank declared that in case of default and payment of the claim the surety should be subrogated to all rights of the city against the bank to the amount of such payment, the surety only has the usual rights of subrogation, and his payment, together with dividends paid by the bank, not being sufficient to discharge the obligations due from the bank, he is not entitled to subrogation to the detriment of the city. *Ib.*

3. *Right to subrogation. Volunteers.*

Where a surety on the bond of a government contractor completed the work, its right to subrogation to the rights of the federal government was superior to the right of a bank which advanced money to the contractor for payment of labor and materials, though the bond guaranteed performance, and was

TAXES AND TAXATION—TELEGRAPHS AND TELEPHONES.

SUBROGATION—Continued.

conditioned upon payment of all claims for labor and material.
People's Nat. Bank v. Corse, 720.

TAXES AND TAXATION

1. *Exemptions. Municipal corporations. Property. "Public purpose." Used for public purposes.*

Const., art. 2, sec. 28, provides that "all property . . . shall be taxed, but the legislature may except such as may be held by . . . cities or towns and used exclusively for public or corporation purposes." The Revenue Act exempted from taxation all property of cities or towns "that is used exclusively for public or municipal purposes." Acts 1909, ch. 121, grants to plaintiff city the power to "own and operate a system of waterworks for said city and adjacent territory." Plaintiff city constructed a water pipe line to the national home for volunteer soldiers lying partly within and largely without its limits. The county sought to tax the pipe line, alleging that it was not used exclusively for public purposes. *Held*, that the pipe line was exempt from taxation, since the private use for the home was but incidental to the primary use, which was public in character, since the convenience of surrounding territory might properly be served by the line, and considerations of welfare of the city demanded that a proper water supply for the prevention of epidemics should be afforded the surrounding territory. *Johnson City v. Weeks*, 277.

2. *Counties. Property liable.*

It is within the power of a county to tax and assess all property within the county, both within and without corporate limits of municipalities, for the purpose of improving and constructing pikes, whether the money so obtained is expended within or without the municipalities; the general laws for dirt road construction not being applicable. *Raulston v. Marion Co.*, 433.

TELEGRAPHS AND TELEPHONES.

Extension of line. Right to make.

A telegraph company was organized under New York act of April 12, 1848 (Laws 1848, ch. 265), providing that any number of persons may associate for the purpose of constructing a line of telegraph through the State from and to any point without the State. New York act of April 8, 1851 (Laws 1851, ch. 98), required the written consent of persons owning two-thirds of the capital stock of such companies as a condition to an extension

TORTS.

TELEGRAPHS AND TELEPHONES—Continued.

of the lines, while New York act of June 29, 1853 (Laws 1853, ch. 471), provided for an extension of the lines upon the terms and conditions prescribed in the act of 1848. *Held*, that after the passage of the act of 1853, written consent of persons holding two-thirds of the stock of such company was not necessary to an extension of its line without the State. *Western Union Tel. Co. v. Railroad*, 691.

TORTS

1. *Resort to legal proceedings. Petition to revoke. Merchant's license.* —

Where a number of residents of a town petitioned the mayor and board of aldermen to revoke the defendant's license as a general merchant on the ground that his store was a public nuisance, pursuant to which the board illegally revoked the license, but the petition was signed and presented without malice and in the honest belief that the board had power to act, defendants were not liable for plaintiff's loss occasioned by the revocation, since their action was a lawful exercise of the right to apply by address to government authorities for the redress of grievances secured by Const. art 1, sec. 23. *McKee v. Hughes*, 455.

2. *Conspiracy. Merchant's license. Petition to revoke. "Civil conspiracy."*

Defendants' motive being the public good, and they being not actuated by malice or intent to injure plaintiff, their action in signing and presenting such petition was not a conspiracy, since a "civil conspiracy" is a combination between two or more persons to accomplish by concert of action an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means; the damage being the gist of any action (citing Words and Phrases, Second Series, Civil Conspiracy). *Ib.*

3. *Libel and slander. Privilege. Legal proceedings.*

Such petitions are privileged only in the absence of malice on the part of the petitioners. *Ib.*

4. *Conspiracy. Merchant's license. Petition to revoke. Malice. Presumption.*

In addressing such a petition to the municipal authorities, the petitioners are presumed to act without malice; the burden being on the party complaining to show the contrary. *Ib.*

See HUSBAND AND WIFE

 TRUSTS—U. S. CONSTITUTION.

TRUSTS

1. *Constructive trusts. Misappropriation of property.*

Where defendant, a salesman employed in complainant's mercantile establishment, appropriated to his own use merchandise and money belonging to complainant, and purchased and improved real property therewith, complainant was entitled to look to such real property as being held under a constructive trust, the absence of the conventional relation of trustee and *cestui que trust* being no obstacle to the granting of equitable relief, and the facts showing, if such showing was necessary, that full trust and confidence and ample power over the receipt and handling of funds and merchandise were given defendant by complainant. *Preston v. Moore*, 247. .

2. *Homestead. Exception from exemption. Constructive. Misappropriation of property.*

A person, who, by reason of the misappropriation of another's property and investment thereof in real estate, was a trustee *ex maleficio* for the person whose property was appropriated, was not entitled to a homestead in such real estate as against the *cestui que trust*. *Ib.*

UNITED STATES

Priorities. Right to.

The United States' right of priority in payment of debts due it is not attribute of sovereignty, but depends on the acts of Congress. *People's Nat. Bank v. Corse*, 720.

UNITED STATES STATUTES CITED AND CONSTRUED

- § 5263. Eminent domain. Telegraph and railway companies. Right to condemn. *Western Union Tel. Co. v. Railroad*, 691.
 §§ 6372, 6374. United States. Priorities. Liens. Right to. "Absent debtor." *People's Nat. Bank v. Corse*, 720.

UNITED STATES CONSTITUTION CITED AND CONSTRUED

Amend. 14. Constitutional law. Construction. *City of Memphis v. State*, 83.

VERDICT—WILLS.

VERDICT

Sales. Breach of contract. Remedy of buyer. Sufficiency.

In such action, where the verdict for defendant on the ground of his right to rescind was correct, whether the jury attributed that right to the ground of fraud or to the defense that there was a breach of a material part of the engagement was immaterial. *Monogram Mfrs. v. Johnson*, 571.

WILLS

1. *Requisites. Execution. Witnesses.*

Where the testator wrote out his will, signed it, and on his request procured the signature of one witness without disclosing that it was a will, and that of another witness after disclosing it to be his will, it is valid, under Shannon's Code, sec. 3895, providing that no will shall be good unless written in the testator's lifetime and signed by him and subscribed in his presence by two witnesses, although neither witness saw him sign or subscribed as witness in the presence of the other witness. *Long v. Mickler*, 51.

2. *Execution. Witnesses.*

Unless publication of the contents of a will to the subscribing witnesses is required by statute, they need not be informed of the character of the document when they subscribe. *Ib.*

3. *Construction. Substitution. Death without issue.*

Though, where there is an immediate gift to a person with a gift over in case of his death without issue, a death without issue during the life of the testator is contemplated, the rule does not apply to a limitation over after a devise in remainder. *Meek v. Trotter*, 145.

4. *Provisions for surviving wife. Operation and effect of election.*

A testator gave a life estate in certain real estate to his wife, and provided that after her death certain parts of such real estate should go to his daughters D. and F., a granddaughter and a grandson; it being further provided that upon the death of the granddaughter, or the daughter F. without issue, the property given them should vest in the daughter D. and her bodily heirs. After certain money legacies, the will gave all other moneys, notes, bonds, and chattels to the children of D. The widow dissented from the will and her dower was laid off in amounts not proportioned to the several estates in remainder, a larger part of the property given to F. being taken than of the property given to the other remaindermen,

WILLS.

WILLS—Continued.

while the child's portion and the year's support allotted to the widow were taken out of property that would otherwise have passed under the legacy to the children of D. *Held*, that F. was entitled to contribution from the other remaindermen to equalize the inequality due to the assignment to the widow of a disproportionate part of the real estate devised to her in remainder. *Meek v. Trotter*, 145.

5. *Provision for wife. Election. Failure. Estoppel.*

Where a widow failed within a year to dissent from her husband's will as provided for by Shannon's Code, sec. 4146, the provision of the will for her being a life estate in land owned by her through a conveyance in fee from the husband to C. and a conveyance by C. to her, she having been led by her husband to believe, as did he, that the title was subsequently revested in him by certain deeds of the same property made by C. to him, reciting that the original deed to C. was a mortgage which had been fully paid, the widow's next of kin and heirs at law were not concluded by the failure on the widow's part to so dissent and her acceptance of the provision of the will in derogation of her title, since the statute, being designed to secure to the wife a proper provision from her husband's property by an election made within a time limited in the interests of the speedy administration of estates, does not apply under such facts. *Battle v. Claiborne*, 286.

6. *Disposition of wife's property by husband's will. Acceptance by wife. Election.*

Nor did the acceptance by the widow of the provision of the will in derogation of her title constitute an election by her whereby she and her representatives were estopped to assert title to the land under the doctrine that, where one by will undertakes to dispose of the property of another by giving to the owner thereof other benefits in lieu, the acceptance of the provision is an election by the beneficiary estopping him to assert title, since the will treated the property as belonging to the husband absolutely, and the wife's acceptance of its provision in the belief that title was in the husband could not be an election. *Ib.*

7. *Probate. Costs.*

An executor who in good faith propounds a will for probate is entitled to his costs and attorney's fees whether the will is set aside or not. *Smith v. Haire*, 343.

WILLS.

WILLS—Continued.8. *Probate. Costs.*

Where a will was procured by fraud and undue influence, and the executrix who propounded it for probate was the chief beneficiary, and was responsible for the fraud, she is not entitled to costs on the theory that she propounded the will in good faith. *Ib.*

9. *Probate. Probate in common form.*

A chancery court has jurisdiction to set aside the probate of a will in common form, where procured through fraud. *State ex rel. v. Goodman*, 375.

10. *Will contest. Evidence.*

In a proceeding where the validity of a will was in issue, evidence held to show that the will was not procured through fraud. *Ib.*

11. *Validity. Personal property.*

To be a valid disposition of personal property, a will need not be attested as required by Shannon's Code, sec. 3895, declaring that no will shall be sufficient to convey an interest in lands unless signed by the testator and subscribed by two disinterested witnesses. *Ib.*

12. *Validity. Personal property.*

While the execution of a will must be proven by two witnesses, or it is not sufficient to pass title to personal property, it is not necessary that such witnesses be subscribing or attesting witnesses. *Ib.*

13. *Validity. Personal property.*

A legatee of personal property is not incompetent by reason of his interest, to prove the execution of the will; his interest going only to his credibility. *Ib.*

14. *Review. Presumptions.*

Where the probate court admitted to probate in common form a will of personality, there is a presumption, in the absence of evidence to the contrary, that there was sufficient evidence to warrant its probate, and that presumption is not overthrown by a showing that some of the witnesses in favor of the will did not see its execution. *Ib.*

15. *Validity. Evidence.*

In a proceeding where the validity of a will was involved, evidence held to warrant a finding that the testator had sufficient mental capacity. *Ib.*

WITNESSES.

WILLS—Continued.

16. *Validity. Condition of testator.*

The bodily infirmities of a testator will not render his will invalid. *State ex rel. v. Goodman*, 375.

17. *Validity. Testamentary capacity.*

That a testator who dictated his will while in his last illness made grammatical errors, and may have used expressions which were not applicable to his estate, does not show his want of mental capacity. *Ib.*

18. *Construction. Bequest.*

The intent of the testator will be given effect, and, where he referred to one of the beneficiaries by name different from her real name, she is entitled to the bequest; it appearing the testator always addressed her in that name. *Ib.*

19. *Awarding of costs. Right to.*

Where the State claimed property by way of escheat asserting that deceased died intestate without heirs, and persons claiming to be heirs set up their rights adverse to claimants under the will, neither the State nor the rival claimants, the will being sustained were entitled to cost. *Ib.*

See ELECTION

WITNESSES

Criminal law. Evidence. Insanity. Qualification of expert.

Where a medical practitioner, testifying in a criminal case, admitted that he had read of insanity only in such books as were possessed by the ordinary practitioners, that he had made no special study of mental disease, and did not regard himself as so well posted on insanity as on typhoid fever, pneumonia, and such general diseases, he was not qualified as an expert on the subject. *Watson v. State*, 198.

